

A PROPOSAL : THE U.N. POST-CONFLICT CRIMINAL JUSTICE REFORM PROJECT

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The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

BY MAJOR HOWARD H. HOEGE
JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES ARMY

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A PROPOSAL: THE U.N. POST-CONFLICT CRIMINAL JUSTICE REFORM PROJECT

MAJOR HOWARD H. HOEGE III*

* Judge Advocate, United States Army. Presently assigned as Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. J.D. 2002, University of Virginia School of Law; B.S., 1994, United States Military Academy, West Point. Previous assignments include Senior Trial Counsel, 101st Airborne Division (Air Assault), Fort Campbell, Kentucky, 2004-2005; Rakkasan Trial Counsel, 187th Infantry Regiment, 101st Airborne Division (Air Assault), Operation Iraqi Freedom, 2003-2004; Operational Law Attorney, 101st Airborne Division (Air Assault), Operation Iraqi Freedom, 2003; Chief, Legal Assistance Division, 101st Airborne Division (Air Assault), Fort Campbell, Kentucky; Commander, Horse Cavalry Detachment, 1st Cavalry Division, Fort Hood, Texas, 1997-1999; Aide-de-Camp, Assistant Division Commander, Maneuver, 1st Cavalry Division, Fort Hood, Texas, 1996-1997; Platoon Leader, 2nd Battalion, 5th Cavalry Regiment, 1st Cavalry Division, Fort Hood, Texas, 1995-1996. Member of the bars of Virginia, the Fourth Circuit Court of Appeals, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 54th Judge Advocate Officer Graduate Course.

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*The United Nations must launch a lasting revolution of reform.*¹

I. Introduction

As Operation Iraqi Freedom developed into an occupation in early 2003, U.S. commanders reached a unanimous conclusion: Iraq possessed “[N]o effective rule of law or functional legal system based on proper legal procedures, human rights, or commercial codes.”² A brief snapshot of the Iraqi criminal justice system provides the clearest evidence to support this conclusion.

Virtually all observers of the Iraqi criminal justice system at the start of the occupation comment on the invasive corruption at all levels of the system.³ Almost to a man, Iraqi judges took bribes as a matter of course and regularly complied with the improper influence.⁴ Compliance meant returning favorable verdicts in the cases of well-connected

¹ Sec’y Condoleezza Rice, U.S. Sec’y of State, Remarks at the 60th United Nations General Assembly (Sept. 17, 2005) (transcript available at <http://www.state.gov/secretary/rm/2005/53374.htm>) [hereinafter Sec’y Rice Remarks at U.N. General Assembly].

² ANTHONY H. CORDESMAN, *THE IRAQ WAR: STRATEGY, TACTICS, AND MILITARY LESSONS* 541 (2003).

³ See generally Civil Affairs Judge Advocate Lessons Learned OIF 1 [hereinafter Civil Affairs JAG AAR] (unpublished, unnumbered after action review) (on file with The Center for Law and Military Operations, The Judge Advocate General’s Legal Center) (recording the observations of U.S. Army JAs working with the Iraqi criminal justice system during Operation Iraqi Freedom); OVERSEAS PROSECUTORIAL DEVELOPMENT & TRAINING OFFICE OF THE U.S. DEP’T OF JUSTICE JUDICIAL ASSESSMENT TEAM, *REPORT OF THE IRAQ JUDICIAL ASSESSMENT TEAM 5* (June 2003) [hereinafter D.O.J. Judicial Assessment Team Report] (unpublished report) (on file with The Center for Law and Military Operations, The Judge Advocate General’s Legal Center) (recording the observations of a U.S. Dep’t. of Justice sponsored Judicial Assessment team during Operation Iraqi Freedom); Office of the U.N. High Commissioner for Human Rights, U.N. Assistance Mission for Iraq, *Building and Strengthening the National Human Rights Protection System in Iraq: The Human Rights Programme*, 48-49 (May 31, 2005) [hereinafter The Iraq Human Rights Programme] (recording the conclusions of the O.H.C.H.R. Legal Assessment Mission conducted in Iraq in August 2003).

⁴ See Civil Affairs JAG AAR, *supra* note 3.

Baath Party officials and members.⁵ To exert the maximum possible control over the outcome of criminal proceedings, Ba'ath party officials would remove cases of regional or national prominence to "security courts" that existed outside of the normal judicial system.⁶

The so-called "telephone justice"⁷ that ensured politically acceptable results in trials was facilitated by the absence of certain fundamental protections for defendants in criminal proceedings. For example, Iraqi criminal defendants did not enjoy a right to counsel.⁸ Coerced confessions provided the evidence for most criminal convictions.⁹ The Iraqi criminal procedure code, in fact, permitted the use of coerced confessions.¹⁰

⁵ *See id.*

⁶ *See id.*; D.O.J. Judicial Assessment Team Report, *supra* note 3, at 5-6.

⁷ D.O.J. Judicial Assessment Team Report, *supra* note 3, at 5. "Telephone justice" refers to the practice of judges and high-level Ba'ath party officials conferring, often by phone, prior to judgment in cases with potential political implications. *See id.*

⁸ *See* Civil Affairs JAG AAR, *supra* note 3; The Iraq Human Rights Programme, *supra* note 3, at 48. The O.H.C.H.R. Legal Needs Assessment Mission characterized it this way: "Most of Iraqi society was disenfranchised from access to any meaningful judicial remedy." *See* The Iraq Human Rights Programme, *supra* note 3, at 48.

⁹ *See* Civil Affairs JAG AAR, *supra* note 3.

¹⁰ Law on Criminal Proceedings with Amendments, Number 23 of 1971, The Revolutionary Command Council, Paragraph 218 [hereinafter Iraq Criminal Procedure] (on file with author). Paragraph 218 directs:

It is a condition of the acceptance of the confession that it is not given as a result of coercion, whether it be physical or moral, a promise or a threat. Nevertheless, if there is no causal link between the coercion and the confession or if the confession is corroborated by other evidence which convinces the court that it is true or which has led to uncovering a certain truth, then the court may accept it. *Id.*

Although Paragraph 218 provides lip service to the notion that coerced confessions are unacceptable at court, the court could, in fact, accept a coerced confession if there is corroborating evidence or if there is no causal link between the coercion and the confession. Therefore, consider the text of Paragraph 221:

The minutes, reports, and official letters written by officials and employees dealing with an infraction are regarded as proof of the events they contain. The court must rely on these as its

Even before trial, Iraqis thrust into the criminal justice system experienced treatment that lacked even the most fundamental protections. Iraqi police could arrest a person based on mere “suspicion,” a term defined by the subjective whim of the arresting officer.¹¹ A person thus detained on “suspicion” possessed no right to be notified of the offense of which police suspected him and received no systemic review of his detention.¹² Bribes to the Iraqi police operated as the primary mechanism by which police released “suspects.”¹³ Once detained, the police systemically lost accountability of the prisoners by failing to keep records of who populated the jails.¹⁴ Finally, the Iraqi police often allowed the physical conditions within the detention cells to degrade to uninhabitable levels.¹⁵

reason for its ruling on the infraction. It is not however obliged to investigate their veracity. The defendant’s side nevertheless has to prove that they are true. *Id.* at para. 221.

The combination of Paragraphs 218 and 221, then, provides the means by which police may torture a defendant, secure his confession, then write a report either renouncing the causal link between the coercion and the confession or denying the torture ever occurred. The report would presumably not even be necessary provided a “witness” to the crime could testify in corroboration of the defendant’s coerced confession.

¹¹ Memorandum, SFC Kevin Strakal, Noncommissioned Officer-in-Charge, Mosul Office of Judicial Operations, to CPT Jamie Phillips, Officer-in-Charge, Mosul Office of Judicial Operations, subject: Problems, Conclusions, and Recommendations Relative to the Mosul Criminal Justice System (Jun. 2003) [hereinafter Strakal Memorandum] (on file with author); *see also* Iraq Criminal Procedure, *supra* note 10, at para. 1(B) (establishing the conditions under which an offense has been “witnessed,” thereby establishing suspicion). Paragraph 1(B) states:

The offence is considered witnessed if it was witnessed whilst being committed or shortly afterwards or if the victim followed the perpetrator afterwards or if shouting crowds followed him afterwards or if the perpetrator was found a short while later carrying the equipment or weapons or goods or documents or other things pointing to the fact that he was the perpetrator or participant in the offence or if traces or signs indicate this at the time. *Id.*

¹² Strakal Memorandum, *supra* note 11; *see generally* Iraq Criminal Procedure, *supra* note 10 (including no provisions for reviewing a suspect’s arrest or for notifying the suspect of the offense for which he was arrested).

¹³ *See* Strakal Memorandum, *supra* note 11.

¹⁴ *See id.*

¹⁵ *See id.* Observers noted a build up of trash and human waste within the Iraqi jail cells. *See id.*

U.S. military commanders felt compelled to correct or reform the Iraqi criminal justice system for several reasons. Operationally, Iraqi criminal activity degraded the general security of both U.S. forces and Iraqi civilians.¹⁶ Legally, the Coalition Provisional Authority, responsible for administering occupied Iraq, codified some criminal justice reforms.¹⁷ Politically, international attention held the U.S. accountable for the internal climate of Iraq during the occupation.¹⁸ The confluence of these three concerns resulted in significant U.S. military effort to reconstitute Iraq's failed criminal justice system.¹⁹

Finally, moral reasons often guided the decision of U.S. commanders to reform the Iraqi criminal justice system. Simply put, commanders viewed ending the corruption and maltreatment inherent in the criminal justice system as the "right" thing to do.²⁰ U.S. commanders had tremendous autonomy within their respective areas of responsibility within Iraq.²¹ Restoring public faith in the Iraqi criminal justice system worked in concert with the

¹⁶ See E-mail from COL Michael Linnington, Former Brigade Commander, 3rd Brigade Combat Team, 101st Airborne Division (Air Assault), U.S. Army to MAJ Howard H. Hoege III, Author, U.S. Army (5 Mar. 2006) (on file with author) (explaining the concern with cross-border criminal smuggling activity opening routes and cover for extremists and insurgents into and out of Iraq).

¹⁷ See e.g. Coalition Provisional Authority Order 7, June 9, 2003 (suspending some provisions of the Iraqi Penal Code and establishing the applicable Iraqi substantive and procedural codes).

¹⁸ Interview with COL Michael Linnington, Former Brigade Commander, 3rd Brigade Combat Team, 101st Airborne Division (Air Assault), U.S. Army in Washington, D.C. (Mar. 6, 2006) [hereinafter Linnington Interview]. During the interview, COL Linnington described the notion of the "strategic corporal." The strategic corporal refers generally to any junior service member whose actions gain international attention, subsequently forcing strategic decision makers to account for the surge in international attention. See *id.*; see also Lieutenant General David H. Petraeus, *Learning Counterinsurgency: Observations from Soldiering in Iraq*, MIL. REV., Jan.-Feb. 2006, at 9 (outlining fourteen observations about fighting counterinsurgency, the twelfth of which is "to remember the strategic corporals and strategic lieutenants").

¹⁹ Personal observations?

²⁰ Linnington Interview, *supra* note 18.

²¹ *Id.*

host of humanitarian projects commanders initiated to demonstrate U.S. dedication to the well-being of the Iraqi people.²²

U.S. and Coalition efforts to implement a variety of reforms in Iraq met with almost immediate questions about the legality of those reform efforts.²³ The international law of belligerent occupation presents a confusing and often contradictory array of triggers, standards, and obligations purporting to govern U.S. efforts to reform the failed Iraqi criminal justice system. The body of international humanitarian law that applies in occupied territories, codified in the Hague Regulations of 1907 and the Geneva Convention Relative to the Protection of Civilian Persons,²⁴ contains scant guidance for the occupying force that encounters a dysfunctional criminal justice system in an occupied territory. Of particular relevance, international humanitarian law apparently prohibits efforts by the occupying force to reform a failed criminal justice system.²⁵

²² *Id.*; see also Petraeus, *supra* note 18, at 2 (describing fourteen observations that emphasize the need to synchronize systemic reform in police training and the judiciary with a host of other initiatives to achieve strategic success in Iraq).

²³ See John Innes, *US and UK Action in Post-War Iraq May be Illegal*, May 22, 2003, <http://www.globalpolicy.org/security/issues/iraq/law/2003/0522ag.htm> (questioning the legality of nation building efforts during Operation Iraqi Freedom absent specific authorization from the U.N.). To be precise, the Innes article reports on the discovery of a leaked memo from British Attorney-General Lord Goldsmith to British Prime Minister Tony Blair, dated 7 March 2003, that questions the legality of coalition nation building efforts, to include penal reforms. See *id.*; see also BBC News, *Full Text: Leaked Summary of Advice*, Apr. 27, 2005, available at http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/uk_politics/vote_2005/frontpage/4491801.stm.

²⁴ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 1907 [hereinafter *Hague Regulations*]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter *Geneva Convention IV*].

²⁵ See *Hague Regulations*, *supra* note 24, at art. 43. Article 43 states:

On the contrary, the body of international human rights law may impose an obligation on the occupying force to reform a failed criminal justice system. The crown jewel of international human rights law, the International Covenant on Civil and Political Rights (I.C.C.P.R.), contains numerous provisions establishing individual rights vis-à-vis a State's criminal justice system.²⁶ The I.C.C.P.R. imposes upon States the obligation, "[T]o respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."²⁷ The U.N. Human Rights Committee, which grew out of the I.C.C.P.R., has interpreted the I.C.C.P.R. to mean, "[T]hat a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."²⁸ The

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. *Id.*

See also Geneva Convention IV, *supra* note 24, at art. 64. Article 64 states in relevant part, "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." *Id.*; *see generally* Brett H. McGurk, *Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA. J. INT'L L. 451, 457-460 (2005) (expressing frustration with international humanitarian law's disconnect with contemporary legal issues in occupied Iraq).

²⁶ *See Generally* Int'l Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter I.C.C.P.R.] (establishing fundamental protections for the individual vis-à-vis a State's criminal justice system).

²⁷ *Id.* at art. 2.

²⁸ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) [hereinafter Gen. Comment 31]. *See* discussion on the applicability of the I.C.C.P.R. in an occupied territory *infra* Part II(B).

International Court of Justice (I.C.J.) and scholars likewise argue that the I.C.C.P.R. imposes human rights obligations on an occupying force.²⁹

A third source of international law, the U.N. Charter, creates further confusion when attempting to determine the precise authority permitting or prohibiting an occupying force's efforts to reform a failed criminal justice system in an occupied territory. U.N. Security Council Resolution (U.N.S.C.R.) 1483 directed Coalition Forces administering occupied Iraq to, "[C]omply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."³⁰ Expressly directing the occupiers to comply with international humanitarian law would seem to direct the Coalition Provisional Authority to refrain from reforming Iraq's indigenous criminal justice system.

U.N.S.C.R. 1483 authorizes a U.N. representative, however, to assist the Coalition Provisional Authority and the people of Iraq in, "[E]ncouraging international efforts to promote legal and judicial reform."³¹ U.N.S.C.R. 1483, then, contains an internal inconsistency that memorializes, rather than resolves, the apparent conflict between

²⁹ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, para. 111.; Theodor Schilling, *Is the United States Bound by the ICCPR in Relation to Occupied Territories?* at 4, <http://www.jeanmonnetprogram.org/fellowsforum/Schilling%20Forum%20Paper%20100504.pdf> (last visited Mar. 27, 2006); Koen T'Syen, *The Extraterritorial Scope of the ICCPR*, Specialization Seminar in Human Rights: The Covenant on Civil and Political Rights-Trends and Developments 10-11 (Nov. 2004) (unpublished manuscript, on file with author).

³⁰ See S.C. Res. 1483, ¶ 5, U.N. Doc. S/RES/1483 (May 22, 2003).

³¹ See *id.* ¶ 8(i).

international humanitarian law and international human rights law on the authority of an occupying force to legislate in the realm of the occupied territory's criminal justice system.³²

The existence of the divergent results reached by applying international humanitarian law, international human rights law, and U.N.S.C.R. 1483 to the U.S. occupation of Iraq leads some commentators to declare the law of belligerent occupation dead.³³ Declaring the law of belligerent occupation dead, however, over-dramatizes the unsettled state of contemporary international law. States and international law practitioners should instead simply recognize that international humanitarian law, once the lone regulator of international armed conflict and belligerent occupation, now finds itself in a field occupied also by international human rights law and the actions of the U.N. Security Council. Rather than marginalizing the international humanitarian law of belligerent occupation because of its perceived irrelevance, the international legal system should instead develop an ordering principle to bring harmony to the discordant results of the three competing legal regimes.

This paper proposes a new initiative, the U.N. Post-Conflict Criminal Justice Reform Project (the Project). Minor reforms to the structure and function of the United Nations could provide the ordering principle that would reconcile the contradictory text of the three

³² See McGurk, *supra* note 25, at 460 (arguing that U.N.S.C.R. 1483 “schizophrenically” directs compliance with both international humanitarian law and U.N.S.C.R. 1483’s directives for legal and institutional reform, creating an apparent contradiction in legal authority).

³³ See *id.* at 459. McGurk states, “[W]hatever customary law Article 43 purported to declare in 1907, that law appears to have been overtaken by history and the new norms of state-building in failed and post-conflict states.” *Id.*

competing legal regimes present in the field of belligerent occupation. U.N. reform would also preserve the essential principles upon which each source of international law is based.

Implementing the Project is the most practicable option in this field for several reasons. First, the U.N. Charter trumps conflicting treaty obligations,³⁴ effectively making reform at the U.N. the final word on reconciling competing provisions in the law of belligerent occupation. Second, the U.N. Security Council can and does act in most situations in which we would expect to see an invocation of the law of belligerent occupation.³⁵ Third, as the substance of U.N.S.C.R. 1483 demonstrates, sloppy U.N. action may confuse, rather than clarify, the existing state of the law of belligerent occupation. Correcting the substance of U.N. Security Council Resolutions like U.N.S.C.R. 1483 can eliminate this confusion. Finally, the U.N. Charter contemplates the very function of setting the conditions in which its member States can maximize their adherence to multiple international legal obligations.³⁶

II. The Problem Identified: Defining Occupation³⁷ and Various Triggers for International Humanitarian Law, International Human Rights Law, and U.N. Security Council Action.

³⁴ U.N. Charter art. 103.

³⁵ See generally U.N. Charter art. 39, 41, & 42 (authorizing the U.N. Security Council to determine when it may act (art. 39) and what actions it may take (art. 41 and 42)).

³⁶ U.N. Charter pmb., ¶ 3.

³⁷ The main purpose of this section of the analysis is to demonstrate that each of the three sources of law governing belligerent occupation fails to establish a clear definition of an occupation. Understanding that there are loose bounds on the term “occupation,” the scope of this analysis must focus on one loosely formed conception of belligerent occupation. Some have used the term “occupation” virtually interchangeably with concepts as broad as “state-building.” See generally McGurk, *supra* note 25 (calling for advancements in the

Following its successful invasion of Iraq, the United States made several public statements refusing to accept its status as an occupier, claiming instead to be a “liberator.”³⁸ While the United States ultimately retreated from this rather empty distinction,³⁹ the claim provides an appropriate query to launch our discussion: What is an occupation and how do three competing legal regimes purport to regulate it? The answer to these questions starts with the plain text of the three competing legal regimes.

A. International Humanitarian Law.

A discussion of the law of belligerent occupation should begin with the Hague Regulations of 1907, the first deliberate effort to codify rules governing an occupying

law of “state-building,” but referring to Occupied Iraq and the law of belligerent occupation to address the notion of “state-building.”). In the following analysis and for the remainder of this paper, the terms “belligerent occupation” or “occupation” mean the time, following an international armed conflict, from which an armed force occupies and begins to exercise effective authority in a territory until the time at which the armed force relinquishes responsibility for administering the occupied territory. *See generally* JACOB ELON CONNER, THE DEVELOPMENT OF BELLIGERENT OCCUPATION 3-4 (1912) (establishing an occupation as the time when the military has exclusive authority, terminating on the day of “the peace”). As the reader will see, this definition is somewhat fluid. Defining belligerent occupation in this way, however, excludes from this discussion peace operations, nation-building missions, or other instances not following international armed conflict in which the armed force of one nation would find itself in the territory of another nation.

³⁸ *Operation Iraqi Freedom* (President’s Radio Address Apr. 5, 2003) (avoiding the use of the word “occupier” and repeatedly using the word “liberator”) (transcript available at <http://www.whitehouse.gov/news/releases/2003/04/print/20030405.html>).

³⁹ *Meet the Press* (NBC television broadcast Sep. 25, 2004) (quoting General John Abizaid, Commander, U.S. Central Command, as he acknowledges that an occupation exists in Iraq) (transcript available at <http://www.whitehouse.gov/news/releases/2004/09/print/20040928.html>). A number of interesting international relations and international law websites grapple with the very basic question of what the U.S. or Coalition forces should call themselves in Iraq. *See generally* Christopher Preble, *When Liberators Become Occupiers*, Sep. 20, 2004, <http://www.cato.org/dailys/09-20-04.html> (analyzing whether or not the titles “occupier” or “liberator” have significance); Suzanne Nossel, *Winning the Postwar*, May/Jun. 2003, http://www.legalaffairs.org/issues/May-June-2003/argument_nossel_mayjun03.msp (arguing for the use of terms like “trustee” or “protector” to characterize the U.S. occupation of Iraq).

force.⁴⁰ Article 42 of the Hague Regulations states, “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”⁴¹ The Hague Regulations do not expressly define what type of conflict gives rise to an occupation. Article 1 of the Convention, however, permits the inference that a regulated occupation only follows an international armed conflict between two Contracting parties.⁴²

Unlike the Hague Regulations, Geneva Convention IV does not expressly define the start of an occupation or the characteristics of an occupation.⁴³ Article 154 of Geneva

⁴⁰ Most scholars avoid pinpointing the genesis of the law of belligerent occupation. Several look to the 1863 Lieber Code, drafted by Dr. Francis Lieber at the behest of President Abraham Lincoln, as the moment at which, “[W]e can precisely say that we have such a thing as belligerent occupation in a legal sense.” CONNER, *supra* note 37, at 5; *See also* DORA APPEL GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914* 14-18 (AMS Press 1968) (1949). Scholars nonetheless hold the Hague Regulations as more authoritative, in part, because Dr. Lieber developed the Lieber Code to govern a civil war. *See id.* at 18. In the words of one scholar, the South, “was simply restored by occupation to its true allegiance as soon as it was wrested from the hostile forces. So much for the legal status of the invaded territory.” CONNER, *supra* note 37, at 55. As a point of interest, the 1863 Lieber Code gave tremendous authority to the “victorious army.”

A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another. Headquarters, Dep’t of Army, Gen. Orders No. 100, “Instructions for the Government of Armies of the United States in the Field,” (Apr. 24, 1863) *in* NATIONAL SECURITY LAW DOCUMENTS 161, 163 (John Norton Moore, Guy B. Roberts, & Robert F. Turner, eds., 1995).

At times, I have used commentary from the 1899 Hague Conferences and the 1907 Hague Conferences interchangeably because, as one author notes, “[T]he 1907 revision of the 1899 code was not undertaken for the purpose of recasting the rules, but only to make amendments in points of detail. Only few amendments and changes were found necessary and feasible in the laws dealing with belligerent occupation.” GRABER, *supra* note 40, at 34. For the issues addressed in this article, commentary remained consistent between the two Conferences.

⁴¹ *See* Hague Regulations, *supra* note 24, art. 42.

⁴² *See id.* art. 1. Article 1 states, in relevant part, “The provisions contained in the Regulations...do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention.” *Id.*

⁴³ *See* Geneva Convention IV, *supra* note 24, art. 2. Article 2 simply states, “The Convention shall also apply to all cases of partial or total occupation of a High Contracting Party.” *Id.* *See also* Joyce A. C. Gutteridge, *The*

Convention IV, however, relegates the Convention's occupation provisions to a supplementary role vis-à-vis the Hague Regulations.⁴⁴ The substantive analysis from the Hague regime concerning the character of an occupation apparently survives, then, the codification of the Geneva rules on occupation.⁴⁵

While the Hague Regulations define the start of the occupation, the territorial scope of the occupation, and to whom the Regulations apply, they remain silent on other important definitions. For example, the Hague Regulations do not define the occupation itself. Likewise, the convention does not identify when an occupation ends. Shortly, the reader will see that these omissions both create some modern frustration with the law of belligerent occupation and provide some flexibility in devising the ordering principle that will relieve that frustration.

The beginning and end of an occupation are important concepts to consider. Obviously, the onset and cessation of an occupation determines the length of time the occupying force must comply with the law of belligerent occupation. As discussed earlier, Article 42 of the Hague Regulations establishes the inception of an occupation at the moment when territory falls "under the authority of the hostile army."⁴⁶ In the absence of an express

Geneva Conventions of 1949, 26 BRIT. Y. B. INT'L L. 294, 299 (1949) (identifying the absence of a definition of "occupation" in Geneva Convention IV).

⁴⁴ See Geneva Convention IV, *supra* note 24, art. 154.

⁴⁵ See Gutteridge, *supra* note 43, at 299 (arguing that "occupation" in Geneva Convention IV means Hague Regulations Article 42 "occupation"). The Geneva Conventions, then, leave us with the same questions regarding the point at which the exercise of authority becomes effective enough to constitute an occupation.

⁴⁶ See Hague Regulations, *supra* note 24, art. 42.

delineation of when an occupation ends, the only fair reading of the Hague Regulations suggests that an occupation ends when territory is no longer under the authority of the hostile army.

The critical question in interpreting Article 42, then, becomes, “When does an army exercise authority over a territory such that an occupation exists?” Here, writings contemporaneous with the Hague negotiations offer some insight. Those attending the Hague negotiations, those commenting on occupation law generally, and those reacting to the text of the Article 42 reach any one of three answers to the question of a hostile army exercising authority in a territory. A few scholars hold the notion that an occupation requires only the presence of soldiers in an area of no local resistance.⁴⁷ An equally small number argue that only the intention of occupying an area of no local resistance can establish an occupation, even if only one soldier physically “occupies” the region.⁴⁸ The majority of scholars and practitioners of the time, however, view an occupation as requiring some level of both physical presence in a region and some “effective” measure of authority within that region.⁴⁹

⁴⁷ See GRABER, *supra* note 40, at 55 (citing WILLIAM E. HALL, A TREATISE ON INTERNATIONAL LAW 482-500 (4th ed. 1895)).

⁴⁸ See GRABER, *supra* note 40, at 62 (citing FRANCOIS COLL, L'OCCUPATION DU TEMPS DE GUERRE 27-28 (1914)).

⁴⁹ See GRABER, *supra* note 40, at 69.

Importantly for the U.S. practitioner, Army Field Manual 27-10 also adopts the view that an occupation requires both physical presence and some effective authority.⁵⁰ The existence of an occupation, says the manual, is a question of fact determined by a number of variables.⁵¹ Unfortunately, the greater number of variables, the less firm our definition of occupation becomes. As one observer notes in her 1949 survey of the state of the law of belligerent occupation:

Whether effective occupation means actual physical occupation or latent power to occupy, the size of the occupying forces, and similar questions, remain uncertain. As a result, while there are many factual situations in which all writers would agree that effective occupation exists, there are many others in which the fact of occupation would be in doubt. This uncertainty has serious consequences because it makes it impossible to state with precision at what point a territory is subject to the laws of belligerent occupation.⁵²

⁵⁰ See U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 355 (18 July 1956) [hereinafter FM 27-10].

⁵¹ See *id.* ¶ 356. Paragraph 356 explains:

It is sufficient that the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district. It is immaterial whether the authority of the occupant is maintained by fixed garrisons or flying columns, whether by large or small forces, so long as the occupation is effective. The number of troops necessary to maintain effective occupation will depend on various considerations such as the disposition of the inhabitants, the number and density of the population, the nature of the terrain, and similar factors. The mere existence of a fort or defended area within the occupied district, provided the fort or defended area is under attack, does not render the occupation of the remainder of the district ineffective. Similarly, the mere existence of local resistance groups does not render the occupation ineffective. *Id.*

⁵² GRABER, *supra* note 40, at 69. One author recounts an exchange between military officers and jurists at the Hague Conference of 1907 that captures the same concern for giving the definition some measure of substance. In that exchange, interestingly, the military officers argued for a more expansive definition of "effective authority," saying, in essence, that a region can be occupied if a force simply moves through, leaving only some contingent of soldiers to protect communications. See WILLIAM I. HULL, THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW 246 (1908). Civilian negotiators rejected this idea, countering that "authority" must be based on sufficient strength to assert itself. See *id.*

Drawing a comparison between an army field manual published in 1956 and the above-quoted commentary published in 1949 neglects an important distinction between the two. The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) informs the drafting of the army field manual, but falls outside the scope of the 1949 commentary quoted above. Geneva Convention IV at once adds to and detracts from our understanding of the nature of belligerent occupation.⁵³

As noted above, Geneva Convention IV essentially defers to the Hague regime concerning the character of an occupation.⁵⁴ While Geneva Convention IV does not definitively establish the end of an occupation, it provides backdoor insight into both the nature of and the cessation of an occupation. Article 6 of Geneva Convention IV explains:

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2...In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory.⁵⁵

Article 6 defines when Geneva Convention IV governs the action of an occupier, but it does not define the temporal or substantive limits of the occupation itself. The final clause

⁵³ In transition to a discussion of Geneva Convention IV and its treatment of occupied territories warrants mention of Protocol I to the 1949 Geneva Conventions. Protocol I treats occupation the same way in which Geneva Convention IV treats it. *See* Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 3, June 8, 1977.

⁵⁴ *See* Gutteridge, *supra* note 43, at 299 (arguing that “occupation” in Geneva Convention IV means Hague Regulations Article 42 “occupation”). The Geneva Conventions, then, leave us with the same questions regarding the point at which the exercise of authority becomes effective enough to constitute an occupation.

⁵⁵ Geneva Convention IV, *supra* note 24, art. 6.

of Article 6, however, provides some insight. Article 6 apparently equates the occupation with exercising “functions of government.” Equating occupation with exercising governmental functions appears to match the abstract requirement for effective authority under the Hague regime, affirming Article 154 of Geneva Convention IV. The idea of exercising governmental functions may intimate, however, an enhanced conception of the nature of an occupation.

Jean Pictet’s commentaries to Geneva Convention IV have achieved a level of authority perhaps unmatched by other commentaries on other conventions. On these points, however,—the start of an occupation, the character of an occupation, and the cessation of an occupation—Pictet offers little to our understanding.

The Convention becomes applicable to individuals, i.e. to the protected persons, as they fall into the hands of the Occupying Power. It follows from this that the word "occupation," as used in [Article 6], has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation...Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.⁵⁶

⁵⁶ Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 6 (Jean S. Pictet ed., 1958) [hereinafter GC IV Commentary].

In his effort to express the expansive reach of the entirety of the Fourth Geneva Convention, Pictet inadvertently obfuscates the definition of an occupation.⁵⁷ In an apparent departure from the requirement for effective authority to establish an occupation under the Hague Regime, Pictet asserts that the mere meeting between a civilian and a military patrol establishes an occupation for purposes of Geneva Convention IV. If Article 154 of Geneva Convention IV is accurate on its face in its declaration that it merely supplements the Hague Regulations of 1907, then readers would expect to see the wholesale departure from the Hague conception of effective authority more explicitly stated in the text of Geneva Convention IV.

An alternative reading of Pictet on this point suggests that Pictet is really attempting to say that Geneva Convention IV protections as they relate to individual civilians are triggered in numerous ways—only one of which is the condition of an occupation. To that end, as Pictet says, “So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above.”⁵⁸ For Pictet, the precise definition of an occupation is less important than his larger point that civilians have complete coverage under Geneva Convention IV. To Pictet, an army cannot categorize or define its way out of providing protection for civilians.

⁵⁷ Only thirty-four of Geneva Convention IV’s 159 articles directly address occupied territories. *See* Geneva Convention IV, *supra* note 24.

⁵⁸ GC IV Commentary, Article 6.

The unfortunate result of this analysis on Geneva Convention IV is that we arrive back where we started. The start, substance, and end of an occupation are unclear under international humanitarian law. Importantly, the body of international humanitarian law has always contained this ambiguity. Analysis to this point has not examined any “new” methods or trends of warfare that render previously settled occupation law provisions “dead.” We will revisit this important point when considering the efficacy of using the U.N. to set occupation law standards. Before exploring the significance of not being able to define the four corners of an occupation, the applicability of human rights law should be examined.

B. International Human Rights Law.

The I.C.C.P.R. does not expressly define occupation, nor does it expressly discuss the Covenant’s applicability during occupation. The I.C.C.P.R.’s silence on the applicability of the Covenant’s substantive provisions during an occupation has not prevented the U.N. Committee on Human Rights from concluding that a State Party does, indeed, have human rights obligations to the people of an occupied territory when that State Party functions as the occupier.⁵⁹ Likewise, the International Court of Justice has determined that an occupying force has human rights obligations in an occupied territory pursuant to its status as a State Party to the I.C.C.P.R.⁶⁰ Finally, scholars have increasingly thrown support behind the

⁵⁹ Gen. Comment 31, *supra* note 28.

⁶⁰ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, para. 111.

notion that the I.C.C.P.R. imposes human rights obligations on an occupier during a belligerent occupation.⁶¹

Article 2 of the I.C.C.P.R. contains the “trigger” for the substantive provisions of the Covenant. “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized in the present Covenant.”⁶² (emphasis added) A State Party’s human rights obligations, then, begin once it has individuals “within its territory and subject to its jurisdiction.”⁶³ The U.N., international courts, and academics, have unanimously invoked two words from Article 2—“and” and “jurisdiction”—to give the I.C.C.P.R. its extraterritorial applicability.⁶⁴

Koen T’Syen of the Turku Law School, for example, engages most directly in grammatical and semantic construction to argue for the I.C.C.P.R.’s extraterritorial applicability by actually titling the sections of his analysis as “A disjunctive reading!” and “The meaning of the notion ‘jurisdiction.’”⁶⁵ T’Syen argues that the I.C.C.P.R. trigger contains a disjunctive “and,” imposing human rights obligations on a state whenever it has an individual within its territory and whenever it has an individual subject to its jurisdiction, no

⁶¹ See generally T’Syen, *supra* note 29, at 11 (concluding the I.C.C.P.R. applies extraterritorially); Schilling, *supra* note 29 (concluding the I.C.C.P.R. applies to an occupying force).

⁶² I.C.C.P.R., *supra* note 26, at art. 2.

⁶³ *Id.*

⁶⁴ See Gen. Comment 31, *supra* note 28; Schilling, *supra* note 29, at 4-6; T’Syen, *supra* note 29, at 9-10.

⁶⁵ See T’Syen, *supra* note 29, at 1.

matter where that individual is located.⁶⁶ T'Syen relies on other academics and the U.N. Committee on Human Rights for support of his position.⁶⁷

Having established that the I.C.C.P.R. has potentially universal reach, T'Syen explores the bounds of I.C.C.P.R. applicability by defining "jurisdiction." T'Syen concludes that, "All relations between states and individuals subject to its power will *prima facie* fall under the notion of 'jurisdiction.'"⁶⁸ T'Syen then walks his readers through a series of "categories of relation," ultimately concluding (although not expressly) that "individuals subject to its power" means all individuals that interact with a state in any way, anytime, or anywhere.⁶⁹ Other scholars agree in varying degrees with T'Syen's disjunctive reading of "and" and his broad interpretation of the meaning of "jurisdiction."⁷⁰

⁶⁶ *See id.* at 9.

⁶⁷ *See id.*

⁶⁸ *See id.* at 10. T'Syen's discussion of "jurisdiction" is, at best, strained. His launching point is General Comment 31's language, "Anyone within the power or effective control of that State Party." *See id.* (quoting Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004)). He then reasons that "all relations" between an individual and a state will trigger ICCPR human rights obligations because, in the end, the "potential" to exercise governmental powers is enough to place an individual under the effective control of a State. *See* T'Syen, *supra* note 29, at 10.

Examples of the breadth of T'Syen's interpretation include, "Military operations, the exercise of authority by diplomatic and consular staff on people seeking their services, law enforcement operations in the territory of a foreign state, actions of secret agents in another country." *See* T'Syen, *supra* note 29, at 11. I offer T'Syen's perspective not to test its accuracy or utility, but only to illustrate my larger point that all kinds of actors currently occupy the field with a variety of perspectives on treaty interpretation as it applies to occupation law.

⁶⁹ *See* T'Syen, *supra* note 29, at 10-11.

⁷⁰ Schilling, *supra* note 29, at 11-12. As Schilling points out in his article, the ECHR trigger is structured differently than the ICCPR trigger. The ECHR imposes obligations more broadly, to everyone within [the High Contracting Parties] jurisdiction. *See id.* As Schilling notes, the ECHR does not incorporate the "within its territory" clause present in the ICCPR. Because I am not attempting to argue for or against any particular position on the extraterritorial applicability of the ICCPR, I have not included an analysis of the ECHR's

Once scholars determine that the I.C.C.P.R. imposes broad obligations on the occupying force responsible for an occupied territory, they then debate whether or not the I.C.C.P.R.'s derogation provisions apply in an occupied territory. Unlike international humanitarian law, codified in the Hague Regulations and Geneva Convention IV, Article 4 of the I.C.C.P.R. provides, "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant."⁷¹

Schilling, applying the I.C.C.P.R.'s derogation principle to occupied territories, tells us, "That a belligerent occupation may be considered a public emergency, at least in the occupied territory, cannot be in doubt."⁷² Schilling unfortunately does not reach an ultimate conclusion on whether or not belligerent occupation permits the derogation of human rights obligations. Instead, he classifies the question as one of State interpretation of the treaty, acknowledging that the United States does not interpret the I.C.C.P.R. as having extraterritorial reach.⁷³ Schilling therefore concedes that he will likely never see his

extraterritorial applicability. If anything, the reliance of academics on the ECHR's extraterritorial applicability serves as further evidence that treaty interpretation has taken an interesting step away from the traditional practice of state interpretation.

⁷¹ I.C.C.P.R., *supra* note 26, at art. 4(1).

⁷² Schilling, *supra* note 29, at 11 (citing Frederick Rawsky, *To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L L. 103, 126 (2002)).

⁷³ See Schilling, *supra* note 29, at 12.

academic speculation regarding the function of the I.C.C.P.R.'s derogation principles tested in practice.⁷⁴

The International Court of Justice (I.C.J.) also adopts the position that the I.C.C.P.R. binds State Parties extraterritorially. In July 2004, the I.C.J. purported to answer the question of whether or not the I.C.C.P.R. had extraterritorial reach, thereby rendering Israel's construction of a security fence in the occupied Palestinian territory illegal.⁷⁵ Addressing first the question of the I.C.C.P.R.'s extraterritorial reach in its advisory opinion, the I.C.J. announced, "[T]he Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."⁷⁶

The I.C.J. dispatched of its analysis in two paragraphs of the opinion.⁷⁷ The court used only the "constant practice" of the U.N. Human Rights Committee as a tool to interpret

⁷⁴ *See id.*

⁷⁵ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, para. 1.

⁷⁶ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, para. 111.

⁷⁷ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, para. 109 & 110.

the I.C.C.P.R.⁷⁸ State practice, or state interpretation of the applicability of the treaty, the traditional tool for treaty interpretation, was noted and rejected by the I.C.J.⁷⁹

The dismissal of state practice or interpretation seems ill-advised in this case. The line of U.N. Human Rights Committee opinions upon which the I.C.J. relied are marked by an important distinction between them and the Israeli security fence case. The relevant U.N. Human Rights Committee opinions relied only dealt with a State Party interacting extraterritorially with one of its own citizens.⁸⁰ The Israeli security fence case, however, dealt with a State Party interacting extraterritorially with individuals not their citizens. One can argue that a citizen of a given state is more solidly within the jurisdiction of that state, even when the citizen is found abroad. The I.C.J. opinion does not indicate how any other State Party of the I.C.C.P.R. views the court's expansion of the U.N. Human Rights Committee's rulings in the Uruguay cases.

Schilling combines U.N.C.H.R. General Comment 31 and the I.C.J. advisory opinion on the Israeli security fence to conclude that the I.C.C.P.R. applies in an occupied territory.

⁷⁸ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, para. 109.

⁷⁹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, para. 110. The I.C.J. looked to communications between the Human Rights Committee and Israel, noted that Israel rejected the notion that the ICCPR applied extraterritorially, and itself rejected Israel's position. *Id.* The Court made no further inquiry as to the meaning other states ascribed to the I.C.C.P.R.'s applicability.

⁸⁰ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, para. 109 (considering a line of Uruguayan cases heard by the U.N. Human Rights Committee. One Uruguayan case dealt with the applicability of the ICCPR when Uruguay arrests one of its citizens extraterritorially. The other case dealt with the applicability of the ICCPR when Uruguay confiscates one of its citizen's passports extraterritorially).

Relying on European Court of Human Rights jurisprudence to elaborate his point, Schilling states:

The ECtHR's jurisprudence may be seen to coincide with, and therefore to buttress, the ICJ's and the UNCHR's present reading of Article 2(1) of the ICCPR. While the latter, contained as they are, respectively, in an advisory opinion and in a General Comment, are not binding, they therefore appear, everything considered, as the best reading of the ICCPR as a living instrument. It follows that the U.S. is bound by the ICCPR also in occupied (or assimilated) foreign territories in which it exercises effective jurisdiction.⁸¹

Again, the point of analyzing the applicability of the I.C.C.P.R. and human rights obligations in an occupied territory is not to arrive at "the answer" regarding the extent of their extraterritorial applicability. Instead, my aim has been to demonstrate that the extent of extraterritorial applicability is unclear. More importantly, illuminating the way in which international legal scholars and practitioners struggle to clarify this area of law provides context for the ultimate question posed by this paper: How do we reconcile apparently conflicting bodies of law in an occupied territory. Before moving toward an answer on that question, we must examine the extent to which our final source of legal obligations in an occupied territory, United Nations action, defines the boundaries of an occupation.

C. The United Nations.

⁸¹ See Schilling, *supra* note 29, at 11. Schilling does not draw a distinction that other scholars have begun to consider. Specifically, in considering the applicability of the I.C.C.P.R. to the actions of an occupying force, the analysis of two sets of I.C.C.P.R. obligations may yield two separate conclusions regarding the I.C.C.P.R. applicability in an occupied territory. While Schilling focuses exclusively on the I.C.C.P.R. obligations of the occupying force, he does not answer whether or not the displaced sovereign has I.C.C.P.R. obligations independent of those governing the occupying force. The occupying force, then, standing in the shoes of the displaced sovereign, may need to meet the displaced sovereign's I.C.C.P.R. obligations. See discussion *infra* Part IV(B)(3)(b).

Unsurprisingly, the U.N. Charter does not define occupation. As a matter of scope of applicability, however, one questions whether or not the U.N. Charter needs to define anything, as it essentially applies anytime and anywhere.⁸² To gain some understanding of how the United Nations might define occupation so that we might anticipate the rules it would implement to govern that occupation, we must turn to the rules governing U.N. action itself.

The U.N. Security Council operates as the United Nations' main body of action.⁸³ To this end, the U.N. Security Council has broad investigative powers in a virtually boundless realm of relations between states.⁸⁴ The U.N. Security Council has especially broad powers to act when it determines "the existence of any threat to the peace, breach of the peace, or act of aggression."⁸⁵ Because occupation involves at the very least one nation's armed forces on another nation's territory, U.N. Security Council action is easily anticipated. In those cases, the U.N. Security Council would apparently have broad authority to declare and define occupation however it chose to do so. Article 103 of the U.N. Charter would apparently then bind member States by the U.N. Security Council's declaration and definition.⁸⁶ Article 103

⁸² See generally U.N. Charter pmbl., art. 1 & 2 (expounding broad aspirational goals and commitments with no temporal or geographical limitations).

⁸³ See U.N. Charter art. 24, ¶ 1.

⁸⁴ See U.N. Charter art. 34. Article 34 provides:

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security. *Id.*

⁸⁵ See U.N. Charter art. 39.

⁸⁶ U.N. Charter art. 103.

states, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter must prevail.”⁸⁷

The U.N. Security Council, then, lays poised to spring into action in various circumstances declaring and defining occupations on an ad hoc basis.⁸⁸ The U.N. Security Council has, on occasion, declared an occupation,⁸⁹ but has not, as of yet, defined one. In any event, analysis of U.N. Security Council authority does not yield any more revealing insight into the nature or scope of an occupation.⁹⁰

⁸⁷ See U.N. Charter art. 103.

⁸⁸ See generally McGurk, *supra* note 25, at 453 (complaining of “ad hoc” U.N. Security Council Resolutions guiding “state-building” missions with no overarching legal framework supporting them).

⁸⁹ See e.g., S.C. Res. 1483, *supra* note 30, pmbl.

⁹⁰ By way of harkening back to the discussion of the applicability of human rights standards in an occupied territory, Schilling includes this somewhat tortured commentary on the intersection of U.N.S.C. action and the ICCPR:

It is conceivable that the ICCPR...controls the way its States parties vote in the Security Council on certain issues. In particular, it is conceivable that those States parties have to respect the international law duty inherent in every treaty not to frustrate the objects of that treaty. If so, while a violation of that duty presumably would not affect, in principle, the authority and the effects of a security Council resolution voted regardless, the general international law principle that no State must benefit from its own wrongdoing may prevent a State from relying on a Security Council resolution in defense against the reproach of having infringed the ICCPR in cases in which it was itself instrumental in bringing about that resolution and was thereby violating the ICCPR. See Schilling, *supra* note 29, at 13.

Schilling concludes, then, after some analysis, that a State participating in UNSC decision-making exercises its “jurisdiction” for ICCPR purposes—theoretically imposing ICCPR human rights obligations on the State relative to every human being on planet Earth. See *id.* at 16. T’Syen’s previously discussed conclusion that the mere *potential* for a state to act relative to a person imposes ICCPR human rights obligations on the state, coupled with Schilling’s proposition above, imposes on every member of the UNSC perpetual ICCPR human rights obligations relative to every last person on the planet.

The U.N. Security Council is not the only U.N. organization to speak in the field of belligerent occupation. Recall that the U.N. Committee on Human Rights issued General Comment 31, a document used by scholars and the I.C.J. to argue for human rights obligations in an occupied territory. Although the U.N. Committee on Human Rights does not issue “binding” rulings or findings, its comments are apparently persuasive authority in I.C.J. jurisprudence.⁹¹ Again, the U.N. Committee on Human Rights has never enumerated the conditions that would constitute occupation. That said, the I.C.J. relied on the U.N. Committee on Human Rights’ “constant practice” of applying the I.C.C.P.R. extraterritorially as justification for the court’s holding that the I.C.C.P.R. applied in an occupied territory. Yet the practice of extraterritorial application of the I.C.C.P.R. is hardly constant with the U.N. Committee on Human Rights.

In 1981, the U.N. Committee Human Rights published an opinion that said, in *obiter*, that instances of occupation were expressly considered and rejected by the drafters of the I.C.C.P.R. “when they confined the obligations of state parties to their own territory.”⁹² Thus, the “constant practice” cited by the I.C.J. should have been more properly termed “recent practice.” In either case, it is inconsistent practice without substantive explanation for the change on the part of the U.N. Commission on Human Rights. This inconsistency, again, demonstrates that the United Nations, like the other two bodies of law addressed

⁹¹ See generally ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, para. 109 (citing U.N.C.H.R. rulings as persuasive authority).

⁹² See Schilling, *supra* note 29, at 4 (quoting U.N.C.H.R., case of *Celiberti de Casariego v. Uruguay* (comm. no. 56/1979), views of 29 July 1981, individual opinion of Tomuschat).

herein, fails to reconcile the competing provisions in international law concerning the law of belligerent occupation.

In the end, plenty of arguments exist for the applicability of each of the three sources of law—international humanitarian law, international human rights law, and U.N. Security Council action—in an occupied territory. None of these arguments, unfortunately, offers a clear moment at which any of these bodies of law applies to an occupation. None of the bodies of law clearly define an occupation. Finally, none of three sources of law clearly establish the moment when it ceases to apply in or following an occupation. The analysis turns, then, to demonstrating why navigating the law of belligerent occupation matters in this conflict of laws situation.

III. The Importance of Reconciling the Law of Belligerent Occupation: The Substantive Standards Embodied by International Humanitarian Law, International Human Rights Law, and U.N. Security Council Action.

The introduction identified a number of reasons why having clear rules to govern a belligerent occupation is important. First, morally, commanders and U.S. forces want to “do the right thing.” Clarity in the law of belligerent occupation makes “doing the right thing” easier. Second, legally, an occupying force should do everything in its power to comply with all components of the law of belligerent occupation. As we will discuss, the international community, and importantly, the United States, have voiced strong belief both in the principles upon which each of the three primary sources of law in this area are based and in the rules giving life to those principles. Finally, pragmatically, compliance with discernible

occupation law standards brings legitimacy and credibility to the actions of an occupying force in an occupied territory. The following discussion will therefore identify the general substantive provisions of each source of law in this area, the principles driving these substantive provisions, and the general permissive or prohibitive nature of those provisions.

A. International Humanitarian Law.

The Hague Regulations contain the most perplexing substantive provision in the law of belligerent occupation: an occupying force must “take all measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”⁹³ In this simple sentence, the Hague Regulations capture the tension between principles of state sovereignty and humanity that will guide the following analysis. In the century since delegates penned these words, debates concerning the precise meaning of this directive focus almost exclusively on the occupying force’s duty to respect the indigenous laws of the occupied territory. Because an occupying force’s ability to reform the criminal justice system of an occupied territory lies at the heart of this paper, developing some of these debates will illuminate the remaining analysis and ultimate recommendations.

Exploring the scope of the occupying force’s duty to respect the indigenous laws of the occupied territory requires an understanding of the principles reflected in the Hague Regulations and espoused by the delegates at the Hague Conferences. As a point of

⁹³ See Hague Regulations, *supra* note 24, at art. 43.

departure, Russian Czar Nicholas II called for the Hague Conferences as a vehicle by which nations could essentially freeze the development of new armaments in an effort to relieve the budgetary strain of maintaining war-ready armies.⁹⁴ Thus economic concerns pervaded negotiations at both Hague Conferences.

Economics becomes visible in the Hague Conferences in two forms, each reflecting, to some degree, a notion of property rights. One scholar, commenting on the law of belligerent occupation contemporaneously with the Hague Conferences, drew attention to the role of individual property rights in the development of this body of law.⁹⁵ Armies of the day lacked the capability to sustain long supply trains, forcing reliance on indigenous populations for provisions.⁹⁶ Many of the substantive provisions in the Hague Regulations seek to

⁹⁴ JOSEPH H. CHOATE, *THE TWO HAGUE CONFERENCES* 6 (1913). On 24 August 1898, Czar Nicholas II invited the nations with whom he had established diplomatic relations to attend a peace conference at the Hague. In his dispatch, he stressed the continuing economic strain of massing arms and the increasing lethality of those arms. *Id.* at 5-6. *See also* HULL, *supra* note 52, at 2-3. One member of the U.S. delegation to the Hague Conferences, Frederick Holls, wrote extensively on the economic difficulties of massing and maintaining an army immediately prior to the convening of the Hague Conferences. *See generally* FREDERICK W. HOLLS, *THE PEACE CONFERENCE AT THE HAGUE* 8-22 (1914) (citing several documents and conversations of the period that lament the economic strain of several European nations struggling to maintain their armies).

The Hague Conference of 1907 was again convened by the Russians, with some initial nudge by President Roosevelt. *See* CHOATE, *supra* note 94, at 50-51; HULL, *supra* note 52, at 5. Interestingly, the extant rationale for the original conference remained, but appeared more acute for the Russians as the second conference followed their loss to the Japanese in the Russo-Japanese War of 1904-1905. *See* JAMES L. STOKESBURY, *A SHORT HISTORY OF WORLD WAR I* 62 (1981). This particular time period, for the Russians, was one of almost desperate reconstitution following a debilitating defeat. *See id.*

⁹⁵ *See* CONNER, *supra* note 37, at 53. An occupying army could use the occupied state's funds to buy supplies from the occupied populace—the thought being that suffering was not delivered on the people individually, but on the people generally as members of the state. *See id.*

⁹⁶ *See id.*

respect the property rights of civilians and ease the economic impact of warfighting on those civilians by requiring armies to pay for their supplies.⁹⁷

On a larger scale, writers at the time of the Hague Conferences contemplated one of two outcomes resulting from a belligerent occupation: restoration of the displaced sovereign or conquest.⁹⁸ Placing conquest aside, anticipating the ultimate return of the sovereign regime to once again rule the country evinces the temporary nature of an occupation.⁹⁹ The occupying force, accordingly, acts as a steward for the public resources which rightfully belong to the displaced sovereign.¹⁰⁰

While economic concerns provide an introductory mechanism for understanding the Hague Conferences, they are not entirely divorceable from the larger notion of state sovereignty that played an equally prominent role during the Hague Conferences. To be sure, the state performed as the preeminent actor on the world stage during the Hague Conferences. The “usufructuary”¹⁰¹ role of the occupying force vis-à-vis the legitimate, albeit displaced, sovereign provides a dramatic statement of this principle in the Hague Regulations.

⁹⁷ *See id.*

⁹⁸ *See id.* at 62.

⁹⁹ *See id.*

¹⁰⁰ *See* Hague Regulations, *supra* note 24, at art. 55.

¹⁰¹ *See id.*

The U.S. approach to the Hague Conferences clearly demonstrates the importance of sovereignty as a guiding principle for the negotiations. For the American reader, it is important to understand the Hague Conferences against the backdrop of the Monroe Doctrine. The Monroe Doctrine provided that the United States would not interfere with the internal affairs of a sovereign state and that she would likewise not tolerate efforts to interfere in the internal affairs of any state in the Western Hemisphere.¹⁰²

Although expressly raised by U.S. delegates in response to an issue unrelated to the Hague Regulations' occupation provisions, the Monroe Doctrine nonetheless influenced the American delegation.¹⁰³ One of the U.S. delegates, writing after the Hague Conferences,

¹⁰² See JAMES WEST DAVIDSON, WILLIAM E. GIENAPP, CHRISTINE LEIGH HEYRMAN, MARK H. LYTLE, & MICHAEL B. STOFF, *NATION OF NATIONS* 331 (1990).

¹⁰³ See CHOATE, *supra* note 94, at 62. It is interesting that the American delegates to the Hague conferences would invoke the Monroe Doctrine. At first blush, the Monroe Doctrine appears to be founded on the principal of respecting each nation's individual sovereignty. The Doctrine, however, has its roots in colonization—not invasion or the idea of temporary belligerent occupation following armed conflict. Then-President James Monroe pronounced the Doctrine in his annual message to Congress on December 2, 1823. See DAVIDSON et al, *supra* note 102, at 331. Following on the heels of the War of 1812, President Monroe declared, "The American continents...are henceforth not to be considered as subjects for future colonization by any European powers." See *Id.* The Monroe Doctrine, then, was originally less about the high principal of respecting each nation's inherent sovereignty and more about protecting a fledgling nation's new found sovereignty.

That said, another U.S. delegate to the Hague conferences, Frederick Holls, recounts the reservation he submitted on behalf of the United States concerning the establishment of an international arbitration tribunal intended to resolve disputes between nations:

Nothing contained in this Convention shall be so construed as to require the United States of America to depart from its traditional policy of not entering upon, interfering with, or entangling itself in the political questions or internal administration of any foreign state, nor shall anything contained in the said Convention be so construed as to require the relinquishment, by the United States of America, of its traditional attitude toward purely American questions. HOLLs, *supra* note 94, at 270.

Holls expressly attributes this statement to the Monroe Doctrine. His statement provides an interesting study of how the Monroe Doctrine grew from its colonial roots to represent a statement of U.S. respect for state sovereignty. Importantly, as Holls invokes the colonial aspirations of European states as he describes the reservation that he submitted. See *id.*

highlighted some European nations' general disregard for the principle of state sovereignty.¹⁰⁴ Those European nations were still actively colonizing Africa and elsewhere during the era of the Hague Conferences, giving rise to the U.S. delegate's concern.¹⁰⁵ Indeed, a Belgian delegate registered a similar protestation during the Hague Conferences. As a representative of one of the smaller Hague States, the Belgian delegate opposed the establishment of any rules governing an occupation lest the Conferences be seen as endorsing the right of conquest in contravention of state sovereignty.¹⁰⁶

Understanding that the Hague Regulations contemplate temporary occupation with rules to preserve individual and collective property rights and the sovereignty of the displaced regime, permits testing of the scope of the Hague Regulations' substantive provisions. The extent to which the Hague Regulations permit the occupying force to legislate in the area of indigenous criminal justice law holds particular relevance to our discussion. Unsurprisingly, however, the Hague Regulations do not contain any provisions expressly addressing the extent to which "respect the laws" governs the indigenous criminal justice system.

Contemporaneous writings, however, carefully separated criminal offenses specifically committed against the occupying force and criminal offenses committed

¹⁰⁴ See CHOATE, *supra* note 94, at 24-26.

¹⁰⁵ See *id.*

¹⁰⁶ See HULL, *supra* note 52, at 243.

generally within the indigenous population.¹⁰⁷ Parsing out crimes of very specific nature and assigning the adjudication of them in this way clearly demonstrates the balance between preserving the freedom for continued military operations and protecting the sovereignty of the displaced regime.¹⁰⁸ Having drawn the distinction, authors detailed a system by which the crimes specifically targeting the occupying force are handled in a system of military tribunals administered by the occupying force and the crimes generally targeting civilians in the indigenous population are handled in the existing criminal justice system of the occupied territory.¹⁰⁹

The creation of two systems for adjudicating criminal activity in an occupied territory segues into two other important considerations worth highlighting. First, the Hague Regulations speak to an implied distinction between two important roles performed by the occupying force. One role has the occupying force acting in its military capacity, protecting its own security and sustaining its military effort. Most provisions in the Hague Regulations recognize the very direct impact on the civilian population resulting from the occupying force acting in this purely military capacity.¹¹⁰ In this capacity, the occupying force's activity directly impacts the civilian population.

¹⁰⁷ See GRABER, *supra* note 40, at 158.

¹⁰⁸ See *id.* at 160.

¹⁰⁹ See *id.* at 158.

¹¹⁰ See Hague Regulations, *supra* note 24, at art. 44 (prohibiting the occupying force from compelling the civilian population to surrender intelligence about the other belligerent; See *id.* at art. 45 (prohibiting the occupying force from compelling the civilian population to swear allegiance to the occupier); see *id.* at art. 46 (prohibiting the occupying force from confiscating private property and compelling the occupying force to respect specific, enumerated individual rights of the civilian population); see *id.* at art. 47 (prohibiting

The other role envisions the military acting in an administrative capacity, facilitating the continuing operations of the government of the occupied territory. Fewer provisions in the Hague Regulations address the direct impact on the occupied territory's national resources and infrastructure resulting from the occupying force acting in this governmental capacity.¹¹¹ In this capacity, the occupying force's activity only indirectly impacts the civilian population.

This distinction between roles for the occupying force and the resulting direct or indirect impact on the civilian population raises the second consideration worth highlighting: determining the permissive or prohibitive nature of the Hague Regulations provisions. The Hague Regulations are at once permissive and prohibitive. The dual nature of the Hague Regulations generally is nowhere more explicit than in the language of Article 43 itself. Article 43 of the Hague Regulations directs the occupying force both to "take all measures" to "restore" and "ensure" public order and safety and to respect the laws in force.¹¹²

pillaging); *see id.* at art. 49 (contributions must be solely for the use of the occupying force or the state); *see id.* at 50 (prohibiting mass punishment for criminal acts); *see id.* at 51 (requiring the occupying force to give a receipt to individuals from whom a contribution is exacted); *see id.* at 53 (requiring compensation of individuals from whom the occupying force seizes supplies). *See also* HULL, *supra* note 52, at 246 (characterizing the provisions of the Hague Regulations as "treatment in general; the exaction of taxes, contributions, etc.; and the treatment of public property). Hull observes that the focus of the Hague Regulations was primarily with the occupying force acting in this purely military capacity sustaining its warfighting capability. *See id.* at 250.

¹¹¹ *See* Hague Regulations, *supra* note 24, art. 48 (requiring the occupying force to comply with existing laws when collecting taxes, dues, and tolls to the same extent the "legitimate Government" had to do so); *see id.* art 53 (limiting the occupying force's ability to seize property without compensation to only that body of property that could possibly be used for military operations); *see id.* art 55 (relegating the occupying force to a position of stewardship relative to public properties and infrastructure).

¹¹² *See* Hague Regulations, *supra* note 24, art. 43.

As we have seen repeatedly before, the Hague Regulations do not expressly specify the extent to which an occupying force is permitted to act pursuant to its duty to restore and ensure or the extent to which an occupying force is prohibited from acting in compliance with its duty to respect the indigenous laws. One scholar offers two approaches to accomplishing this balance. First:

Thus it follows that, when public order and civil life have remained undisturbed, the validity of legislation under Article 43 depends on whether or not the legislating occupant was motivated by a desire to ensure them. There seems little doubt that the term “to ensure public order and civil life” is not a definite and certain concept, but a notion depending on the circumstances of the particular case.¹¹³

Second:

The application of Article 43 of the Hague Regulations might lead to different results in different fields of law. The occupant will be “absolutely prevented from respecting the laws of the occupied country” in the field of public law to a greater extent than in the field of private law since...war is supposedly waged against sovereign and armies and not against subjects and civilians.¹¹⁴

Additional arguments suggest that an occupant could not change systems of government, nor turn a liberal economy into a communist economy.¹¹⁵ With respect to the penal system of an occupied territory, courts could be abolished that would target the

¹¹³ Edmund H. Schwenk, *Legislative Power of the Military Occupant Under Article 43, Hague Regulations*, 54 YALE L. J. 393, 399 (1944-1945).

¹¹⁴ *See id.* at 402-03.

¹¹⁵ *See id.* at 403.

occupied force or discriminate based on race, religion or politics.¹¹⁶ Authors offer no particular justifications for these limitations, but offer them based on their own interpretation of how best to reach an internal permissive and prohibitive balance.¹¹⁷

Perhaps consideration of Geneva Convention IV resolves some of the unsettled provisions in the Hague Regulations. After all, Jean Pictet, author of the persuasive commentaries on all four Geneva Conventions of 1949, notes that part of the impetus to convene the conferences in 1949 was the very recent experience and observations of the International Committee of the Red Cross in World War II, including the post-conflict occupations by allied forces.¹¹⁸ Starting with the fundamental principles driving the negotiations relative to Geneva Convention IV, a shift in focus from that of the Hague Conferences becomes apparent.

Consider this statement of the starting point for the Geneva Conventions generally:

The Geneva Conventions start from the hypothesis that law is a primordial element of civilization. Their struggle is against war, which now threatens to annihilate entire peoples. Their aim is to safeguard respect for the human

¹¹⁶ See *id.* at 405-407.

¹¹⁷ Edmund Schwenk, for example, without supporting authority, writes:

Even though the legislative power of the military occupant is theoretically limited, practically it includes jurisdiction over the entire civilian life of the enemy population if the occupation extends over a considerable period of time. As a result, in the present war situation AMG (the American Military Government) is faced not only with the task of supervising the administration and judiciary of the enemy country, but also with the job of abolishing existing and enacting new laws and decrees. The denazification of the German legal system will have priority. See *id.* at 415.

¹¹⁸ Jean S. Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT'L L. 462, 464 (1951).

person, the fundamental rights of man and his dignity as a human being, in the hope that universal peace—the desire of all men of good will—may one day be established. Conceived with the idea of limiting, so far as possible, the effects of any fresh war, the Geneva Conventions must be read in the spirit which dominated the discussions at the 1949 Conference—a spirit of reprobation of war.”¹¹⁹

With a decidedly individual-based focus, the convention for the “Protection of Civilians,” sets out far more substantive provisions than its Hague predecessor.¹²⁰ In the articles pertaining to penal codes, the Geneva Convention IV maintains the same distinctions present in the Hague Regulations. Geneva Convention IV expressly separates crimes threatening the security of the occupying force and unlike the Hague Regulations, enumerates provisions the occupying force must observe in administering the military tribunals used to try these offenses.¹²¹ Unless authorized by an exception, the occupying force must leave the indigenous penal laws in place in the occupied territory.¹²²

The example of Geneva Convention IV’s handling of criminal justice demonstrates that the distinction between the occupying force acting as an army and the occupying force acting as the government remains relatively intact from the Hague Regulations. Additionally, Geneva Convention IV preserves the flexibility found in the Hague Regulations to at once permit and prohibit the legislative activity of the occupying force. Like the Hague

¹¹⁹ See *id.* at 475.

¹²⁰ The Hague Regulations set out fifteen articles regulating occupied territories. Geneva Convention IV contains thirty-two significantly longer articles governing occupied territories.

¹²¹ See generally Geneva Convention IV, *supra* note 24, art. 65-77.

¹²² See *id.* art. 64.

Regulations, the dual function manifests itself in the language of a single article in Geneva Convention IV. Article 64 of Geneva Convention IV directs that the penal laws “shall remain in force” and the courts of the occupied territory “shall continue to function.”¹²³ At the same time, Article 64 allows that: “The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power.”¹²⁴ Writings from the period largely ignore the bounds of this legislative authority, leaving them untested and undeveloped.

As stated previously, the point of the analysis on the substantive provisions from international humanitarian law is not to determine the scope of those provisions, but to highlight the open questions that have always existed in international humanitarian law relative to belligerent occupation. The unsettled nature of international humanitarian law is borne in large part from the tension between principles of state sovereignty and humanity. Recognizing this tension in the specific provisions in question will, again, help frame the ultimate recommendations to come. First, consider the following analysis of the substantive provisions of international human rights law.

B. International Human Rights Law

¹²³ *See id.*

¹²⁴ *Id.*

In many ways, this analysis flows from and flows more easily than the analysis of international humanitarian law. The statements of guiding principles found in international human rights law are consistent. To the extent that international human rights law presents us with tension, the tension exists between the substance of the source documents and the implementation of those documents and does not exist within the documents themselves.

The analysis so far has focused exclusively on the embodiment of international human rights law in the I.C.C.P.R. For purposes of determining the fundamental principles supporting the I.C.C.P.R., however, considering all four documents that constitute the so-called Bill of Human Rights¹²⁵ provides perspective on how clearly this body of law states its fundamental principles.

The U.N. Charter serves two primary purposes. First, it contemplates the United Nations serving as the primary guarantor of international peace and security.¹²⁶ Second, it contemplates the United Nations serving as the central promoter of global human rights.¹²⁷ Chief among these global human rights are two principles: the inherent dignity of the human being¹²⁸ and self-determination.¹²⁹ Further development of the principles on which the U.N. Charter stands follows shortly.

¹²⁵ The U.N. Charter, the Universal Declaration of Human Rights, the I.C.C.P.R., and the International Covenant on Economic, Social, and Cultural Rights form The International Bill of Human Rights.

¹²⁶ U.N. Charter art. 1, ¶ 1.

¹²⁷ U.N. Charter art. 1, ¶ 2-3.

¹²⁸ U.N. Charter pmbl.

Likewise, in the Universal Declaration of Human Rights adopted by the U.N. General Assembly in 1948, expresses its belief in the inherent dignity of the human being¹³⁰ and the principle of self determination.¹³¹ The I.C.C.P.R. and the International Covenant on Economic, Social, and Cultural Rights state a similar commitment to the inherent dignity of the human being and the principle of self determination.¹³² All four documents invoke the same language toward the same end.¹³³

The I.C.C.P.R., through each of these complimentary documents, has a strong basis of support for the principles captured in its substantive provisions. Again limiting the analysis to the substantive provisions relating to criminal justice, the I.C.C.P.R. provides clear guidance for States implementing its penal system. At the start of this guidance, the I.C.C.P.R. prohibits arbitrary arrest or detention, incorporating both a notice requirement and judicial review of the arrest.¹³⁴ Incarceration must preserve human dignity.¹³⁵

¹²⁹ U.N. Charter art. I, ¶ 2.

¹³⁰ Universal Declaration of Human Rights, art. 1, 10 Dec. 1948.

¹³¹ Universal Declaration of Human Rights, art. 21, 10 Dec. 1948.

¹³² See I.C.C.P.R., *supra* note 26, pmb. & art. 1; International Covenant on Social, Economic, and Cultural Rights.

¹³³ Importantly, the U.N. Charter and the I.C.C.P.R. affirmatively acknowledge state sovereignty, although not as prominently as the sources of international humanitarian law. See U.N. Charter art. 2, ¶ 7; I.C.C.P.R., *supra* note 26, art. 4.

¹³⁴ See I.C.C.P.R., *supra* note 26, art. 9.

¹³⁵ See *id.* art. 10.

At trial, the defendant possesses the right to be presumed innocent until proven guilty.¹³⁶ The defendant must have adequate time to prepare for trial, but must not suffer undue delay in coming to trial.¹³⁷ He has a right to counsel and to examine witnesses.¹³⁸ The defendant may not be compelled to testify against himself or otherwise forced to confess.¹³⁹

These rights do not reflect a necessarily permissive or prohibitive nature. Instead, the I.C.C.P.R. provisions impose an obligation upon governments to protect the individual rights contained within it. The slightly different approach in conceptualizing the nature of the I.C.C.P.R. provisions as compared to the approach of international humanitarian law reflects the differing conception of sovereignty between the two regimes. International humanitarian law focuses on state sovereignty, contemplating only state action. Therefore, the regime is structured to either permit or prohibit state action. To the extent individuals receive protection under international humanitarian law, that protection is gratuitous and not expressed in terms of inviolability of individual rights. On the contrary, the I.C.C.P.R. recognizes the notion of individual sovereignty, saying essentially that whatever action a state takes, it must preserve the enumerated individual rights as it does so.

Again, the substantive provisions of the I.C.C.P.R. hold no particularly vexing uncertainties. As discussed above, the I.C.C.P.R.'s uncomfortable relationship with the law

¹³⁶ See *id.* art. 14.

¹³⁷ See *id.* art. 14, ¶¶ 3(b)-3(c).

¹³⁸ See *id.* art. 14, ¶¶ 3(d)-3(e).

¹³⁹ See *id.* art. 14, ¶ 3(g).

of belligerent occupation derives from questions about its applicability during occupation, not from any uncertain terms in its substantive provisions.

C. The United Nations.

While the body of international humanitarian law reflects a state-centric approach to regulating belligerent occupation and the body of international human rights law reflects an individual-centric approach to regulating belligerent occupation, the U.N.S.C.R. 1483 reflects a confusing collision of the two. In this sense, the United Nations is a unique international organization in that it truly serves two masters. On the one hand, as discussed earlier, the United Nations purports to serve as the central international body responsible for the promotion of global human rights, embracing the sanctity of the individual.¹⁴⁰ On the other hand, the U.N. Charter delicately subjugates its role as peace maintainer to the sovereignty of its member states.¹⁴¹

The U.N. Charter, then, embodies competing principles that destine its action to the same uncertain results observed in international humanitarian law. Without recognizing the inherently tenuous position in which it finds itself, the U.N. Security Council plodded through U.N.S.C.R. 1483 in an ad hoc fashion.¹⁴² To start, U.N.S.C.R. 1483 expressly

¹⁴⁰ See U.N. Charter pmb.

¹⁴¹ See U.N. Charter art. 2, ¶ 7 & art. 51. This subjugation is the necessary vehicle by which international law is, in fact, formed. Without consent by the State to be bound by international law, the external sovereignty of the nation state could not otherwise be governed by international rules. See BRUNO SIMMA, *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 70 (2d ed. 2002).

¹⁴² See generally McGurk, *supra* note 25, at 463 (noting the ad hoc nature of U.N. Security Council Resolutions).

identifies itself as a document meant to regulate the conduct of the occupation of Iraq.¹⁴³ As such, it provides the clearest example of the U.N. Security Council Resolution as a source of law of belligerent occupation.

U.N.S.C.R. 1483 expressly invokes both the Hague Regulations and Geneva Convention IV when it calls upon the Coalition to comply with international humanitarian law.¹⁴⁴ The U.N. Security Council then requests the U.N. Secretary General to provide assistance for a number of ongoing projects and programs in Iraq that resemble provisions from international human rights law.¹⁴⁵ The U.N. Security Council presumably accepts these projects as permissible under the law of belligerent occupation, but does not qualify them as obligatory or permissive. Both of the other sources of law of belligerent occupation, then, are brought together in this single document. But none of the U.N.S.C.R. 1483 provisions explain how these other two bodies of law interact.

Another interesting substantive provision assigns the United States and Great Britain the responsibility for meeting Iraq's preexisting disarmament obligation under previous U.N. Security Council Resolutions.¹⁴⁶ This particular provision unintentionally touches the very

¹⁴³ See S.C. Res. 1483, *supra* note 30, pmb1.

¹⁴⁴ See *id.* ¶ 5.

¹⁴⁵ See generally *id.* ¶ 8 (asking the U.N. Secretary-General representative to assist in humanitarian and reconstruction efforts; in refugee operations; in the establishment of national and local institutions for representative governance; in promoting economic reforms; in protecting human rights; in rebuilding the capacity of the Iraqi police force; and in assisting legal and judicial reform); see also The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 24 of Security Council Resolution 1483, delivered to the Security Council*, U.N. Doc. S/2003/715 (July 17, 2003) (describing how the U.N. Secretary-General was implementing U.N.S.C.R. 1483).

¹⁴⁶ See S.C. Res. 1483, *supra* note 30, ¶ 11.

issue raised by international humanitarian law regarding the occupier's legal status: steward or sovereign. Unfortunately, the U.N. Security Council does not clearly explain whether it is empowering the occupying force with the sovereignty of the state or merely as a steward. Furthermore, the U.N. Security Council does not indicate whether or not the occupying force assumes the former Iraqi regime's responsibilities in only this specific area.

These questions highlight the central frustration with U.N. Security Council action as a source of law: the United Nations possesses the authority to intervene at anytime and impose obligations on an occupying force, whether or not those obligations existed elsewhere in international law prior to U.N. action. U.N.S.C.R. 1483 also incorporates the other two sources of the law of belligerent occupation, with all of the unsettled issues accompanying them, and fails to articulate how any of the three pieces of the puzzle fit together. After a century of "development," the law of belligerent occupation desperately needs some order.

IV. The Solution: Implementing The U.N. Post-Conflict Criminal Justice Reform Project as the Ordering Principle Synchronizing the Law of Belligerent Occupation.

Before outlining a proposal to reconcile the competing principles and inconsistent application of the law of belligerent occupation, it is helpful to restate the central problem developed thus far in the analysis. Three bodies of international law purport to govern the actions of an occupying force. Unfortunately, the apparent internal inconsistencies within each body and inconsistencies between each body provide conflicting guidance for the occupying force faced with a failed criminal justice system in an occupied territory.

An occupying force, attempting to administer the occupied territory's criminal justice system, struggles with tension between important, but not always complimentary, principles upon which these three conflicting bodies of international law are founded. The occupying force must respect the sovereignty of the subsequent regime, yet protect the individual human rights of the indigenous population. The occupying force must determine whether it is permitted to legislate human rights reform or it is prohibited from doing so. Indeed, the occupying force must determine whether or not it is, in fact, obligated to implement human rights reform within the failed criminal justice system of the occupied territory. Recalling these existing dilemmas in the law of belligerent occupation, the analysis turns to considering a solution.

A. Other Solutions Considered.

Many view the problem of the unsettled state of the law of belligerent occupation as a problem with the original conception of international humanitarian law. They argue, essentially, that the drafters of the Hague Regulations only contemplated a traditional war over a territorial dispute between two fully developed, western European states.¹⁴⁷ The drafters of the Hague Regulations did not anticipate, the argument goes, the nature of modern conflict—specifically, that one or more of the belligerents would be failed states requiring a

¹⁴⁷ See Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1591 (1984-1985).

substantial post-conflict nation-building effort.¹⁴⁸ The uncertainty in the law of belligerent occupation detailed in this article results from poor drafting that lacks relevance today.

At least two solutions surface to remedy this problem. One solution would scrap Article 43 of the Hague Regulations, clearing the way for a new convention or some international body charged with setting standards in the law of belligerent occupation that would bring together necessary measures to facilitate post-conflict nation-building.¹⁴⁹ A second solution would simply reinterpret Article 43 of the Hague Regulations to include broad grants of authority to engage in post-conflict nation-building.

Simply calling for a new convention or some particular project to set new standards is appealing in some ways. As one U.S. delegate to the Hague Convention comments, “The Peace Conference was the first diplomatic gathering called to discuss guarantees of peace, without reference to any particular war, --past, present or prospective.”¹⁵⁰ In this spirit, a new convention or new standards project would continue further down the same course of the development of international law. Yet, setting standards today in the form of a new convention, for example, invites new claims of irrelevance tomorrow. A convention detailed enough to address today’s concerns in Iraq might well miss the concerns raised by the next conflict. A convention general enough to contemplate a number of post-conflict occupations

¹⁴⁸ See *id.* at 1591-1592; McGurk, *supra* note 25, at 459.

¹⁴⁹ See generally Goodman, *supra* note 147, at 1573 (calling for “new standards” in the law of belligerent occupation without clearly identifying whether that takes the form of a new convention, a new international court, or the enhanced role of a humanitarian organization, each of which he mentions in the article).

¹⁵⁰ HOLLS, *supra* note 94, at 352.

would likely present problems of inconsistent interpretation. In any event, “new” standards, by themselves, may not do much to develop the law of belligerent occupation.

Perhaps simply “reinterpreting” the existing international humanitarian law of belligerent occupation could address today’s concerns. Two faulty assumptions lie at the heart of modern misinterpretation of Article 43 of the Hague Regulations, so the argument goes. First, the assumption that an ousted sovereign will return in the case of a failed state no longer makes sense.¹⁵¹ Second, the assumption that Article 43 of the Hague Regulations survived Geneva Convention IV cannot be true because the human rights obligations imposed on the occupying force cannot coexist with a notion that the indigenous legal system may not be overhauled.¹⁵²

Again, “reinterpreting” the existing international humanitarian law of belligerent occupation seems appealing at first blush. The conditions of modern warfare have certainly changed, calling into question the asserted assumptions. The proposal to simply “reinterpret” the existing body of law regulating belligerent occupation fails to identify who would do the interpreting. If the United States, for example, decides to simply cast off Article 43, then why would not another state simply decide that another provision no longer reflected reality and disregard that provision? Fairly rapidly, it would seem as though no law of belligerent occupation would exist at all. Furthermore, the law of belligerent occupation simply has very few examples of its historical application. If the occupation of Iraq ultimately looks more

¹⁵¹ See McGurk, *supra* note 25, at 464.

¹⁵² See *id.*

like the exception rather than the rule for modern conflict, how does an interpreting power revitalize in the future a provision that it emasculates today?

Beneath the problems with each of these so-called solutions lies a troubling characterization of the fundamental problem with the law of belligerent occupation. While scholars may accurately portray the drafters of Article 43 as having no conception of modern conflict, it does not necessarily follow that the Hague Regulations, as drafted, are irrelevant. Consider this author, writing just after the Hague Conferences and wrestling with identifying the best way to draft the rules governing an army supplying itself during an occupation:

No two commanders have to face exactly the same set of conditions; hence it is impracticable to prescribe either of the above courses as always the best for all occasions. The commander may find an insolent and insulting population to deal with; he may distrust the competency of his force for the area occupied; he may have guerilla bands, “war rebels” and “war traitors” to contend with; he may be assigned the unpleasant duty, under “military necessity” of burning a city, or devastating a fair region; he may be confronted with such a contingency as meeting a *levee en masse* for certainly the population cannot be blamed for throwing off the burden of constrained obedience whenever they feel themselves competent to do so...All such conditions and many more, so diversify the problem in each particular case that we can only say what is the ideal course in a hypothetically ideal war—that is, a war between states, not individuals.”¹⁵³

The above-quoted language reflects at least some contemporaneous thinking that general language provides the flexibility to meet multiple occupation conditions. True, the situation in Iraq leads to the conclusion that, “Tyrannical and oppressive laws can no longer

¹⁵³ CONNER, *supra* note 37, at 53.

survive merely for the sake of continuity.”¹⁵⁴ That conclusion, however, does not necessarily lead us to the subsequent conclusion that the principle of self-determination “flatly contradict[s] a strict interpretation of Article 43.”¹⁵⁵ What if one of Iraq’s neighboring states invades the fledgling democracy tomorrow, occupying Iraq and subsequently dismantling Iraq’s constitution and legal system? In that plausible circumstance, Article 43 might be singularly important as the authority that the international community invokes to condemn the occupation. Again, the so-called solution apparently fails to settle the law of belligerent occupation.

Others view the problem of the unsettled state of the law of belligerent occupation as a conflict of laws issue between international humanitarian law and international human rights law. Scholars and even the I.C.J. recognize that, “There are two regimes concomitantly applicable which are not necessarily completely in harmony.”¹⁵⁶ The proposed solution to this discord would import a statutory canon of construction into the process of treaty interpretation, favoring the more specific convention over the more general one. In this case, the Hague Regulations and Geneva Convention IV trump the I.C.C.P.R.

¹⁵⁴ See McGurk, *supra* note 25, at 464.

¹⁵⁵ See *id.*

¹⁵⁶ See Schilling, *supra* note 29, at 12. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ REP. 226, para. 25 (July 8).

because the former two conventions contain provisions specifically addressing occupied territories.¹⁵⁷

Of course, this proposed solution resolves none of the problems of interpreting the body of international humanitarian law governing belligerent occupation. Instead, it establishes a false ordering principle over two of the three sources of law governing belligerent occupation, ignoring the third. Furthermore, casting aside international human rights law ignores an important conception of individual sovereignty that has gained a measure of prominence in the international legal system.

We now turn to exploring a third conception of the problem of the unsettled state of the law of belligerent occupation. Borrowing from the second conception just discussed, we properly characterize the unsettled nature of the law of belligerent occupation as one of a conflict of laws. The problem, however, contains more nuance and complexity than mere inconsistencies in text. Instead, the conflicting sources of law vary in the degree to which they define sovereignty, in the principles they embody, and in the general nature of their provisions—permissive, prohibitive, and obligatory. A properly devised ordering principle, then, should do more than rank order the competing sources of law. An ordering principle should reconcile and accommodate each of these important conceptions of sovereignty, principles, and characteristics. The United Nations could provide just such an ordering principle.

¹⁵⁷ See Schilling, *supra* note 29, at 12 (citing J.A. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation*, 18 Y.B. HUM. RTS. 1 (1998)); See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ REP. 226, para. 25 (July 8).

B. U.N. Reform.

1. *U.N. Post-Conflict Criminal Justice Reform Project Critical Tasks Identified*

Identifying the critical tasks that the United Nations must perform to implement the U.N. Post-Conflict Criminal Justice Reform Project provides a convenient departure point for the remaining discussion. To start, the United Nations must develop the substantive standards incorporated in the Project. This initial critical task has three logical components to it.

First, responsibility for the Project must be fixed on a specific U.N. body. The discussion below will identify both the entity that should assign that responsibility and the body that should accept it. Given the number of U.N. committees, commissions, and institutions, also discussed below, directly or indirectly related to criminal justice reform, efficiency and accountability dictate that a single body should steward this Project.

Second, the U.N. entity ultimately charged with stewardship of the Project must determine from where to draw its substantive standards. The analysis above identifies a several potential sources from international humanitarian law, international human rights law, and potentially from within the United Nations itself. The source and actual substance of the Project's substantive standards must survive both legal and political scrutiny.

Third, proper development of the substantive standards for the Project must account for memorializing and disseminating those standards. Translating agreeable provisions to agreeable text presents issues of representation and authority. Similarly, proper dissemination may lend authority and credibility to the communicated standards.

A second critical task the United Nations must perform under the Project is to determine the appropriate trigger for the substantive standards contained therein. The discussion above identifies the difficulty in determining the start and end of an occupation as one of the significant patent ambiguities within the law of belligerent occupation. Clearly identifying when a state must comply with the substantive provisions of the Project will bring much-needed order to the law of belligerent occupation.

The third critical task the United Nations must perform under the Project is to monitor compliance with the substantive standards contained therein. The fourth critical task is U.N. enforcement of those standards. The discussion below develops these latter two tasks. First, the analysis considers both the United Nation's current capacity to perform the Project's four critical tasks and identifies the specific U.N. reforms necessary to enhance that capacity.

2. Assigning Responsibility within the United Nations for the U.N. Post-Conflict Criminal Justice Reform Project.

Assigning stewardship of the Project first requires the identification of those organizations within the U.N. system that deal directly or indirectly with criminal justice reform. From there, analysis of each organization's current capacity to perform the critical

tasks necessary to implement the Project will inform two important decisions. First, the proper U.N. entity to steward the Project should become apparent. Second, the analysis of the designated U.N. organization should reveal any reforms necessary to enhance its capacity to steward the Project. This general framework will guide the following discussion of the seven U.N. organizations directly or indirectly involved in the pursuit of criminal justice reform.

Three of the potential U.N. candidates for stewardship of the Project are immediately identifiable as they incorporate the word “crime” in their title. The first of these, the United Nations Interregional Crime and Justice Research Institute (U.N.I.C.R.I.) purports to “foster just and efficient criminal justice systems” and to “support the respect of international instruments and other standards.”¹⁵⁸ U.N.I.C.R.I. works through and with international and national non-governmental organizations¹⁵⁹ to facilitate programs like juvenile justice projects in Angola and Mozambique or anti-corruption training in four Andean countries.¹⁶⁰

U.N.I.C.R.I. purports to address criminal justice reform in post-conflict areas,¹⁶¹ an especially relevant mission vis-à-vis the Project. Closer scrutiny of U.N.I.C.R.I.’s mandate, however, reveals that U.N.I.C.R.I.’s general claim of criminal justice reform efforts in post-

¹⁵⁸ UNICRI Structure: Mission Statement, <http://www.unicri.it/www/structure/mission.php> (last visited Dec. 4, 2005) (describing the mission statement for U.N.I.C.R.I.).

¹⁵⁹ See United Nations Interregional Crime and Justice Research Institute, History – The New Millenium, http://www.unicri.it/www/history/new_millenium.php (last visited Dec. 4, 2005).

¹⁶⁰ See UNITED NATIONS INTERREGIONAL CRIME AND JUSTICE RESEARCH INSTITUTE, WORK PROGRAMME 2005 para. 3 (2005), *available at* <http://www.unicri.it/www/history/docs/WorkProgramme2005.pdf>.

¹⁶¹ See United Nations Interregional Crime and Justice Research Institute, History – The New Millenium, http://www.unicri.it/www/history/new_millenium.php (last visited Dec. 4, 2005).

conflict areas may overstate both its mandate and its current operations. To start, the U.N. Economic and Social Council adopted the statute governing U.N.I.C.R.I. in 1989.¹⁶² The U.N.I.C.R.I. statute mentions nothing about criminal justice reform in post-conflict areas.¹⁶³ Likewise, the U.N.I.C.R.I. 2005 Work Programme contains no mention of criminal justice reform efforts in post-conflict areas.¹⁶⁴

¹⁶² See U.N.I.C.R.I. Structure: Statute, <http://www.unicri.it/wwa/structure/statute.php> (last visited Dec. 4, 2005).

¹⁶³ See U.N.I.C.R.I. Statute, http://unicri.it/wwa/structure/docs/UNICRI_STATUTE.pdf (last visited Dec. 4, 2005). Article II of the U.N.I.C.R.I. statute, "Objectives and Functions," states:

1. The objective of the Institute shall be to contribute, through research, training, field activities and the collection, exchange and dissemination of information, to the formulation and implementation of improved policies in the field of crime prevention and control...Accordingly, the principal functions of the Institute shall be the following:

(a) To promote, conduct, co-ordinate and support research and, in collaboration with the countries concerned, to organize and support field activities with a view to:

(i) Establishing a reliable base of knowledge and information on social problems involving juvenile delinquency and adult criminality, special attention being given to the new, frequently transnational forms of the phenomena;

(ii) Identifying appropriate strategies, policies and instruments for the prevention and control of the phenomena so as to contribute to socio-economic development and to promote the protection of human rights;

(iii) Designing practical models and systems aimed at providing support for policy formulation, implementation and evaluation;

(b) To provide action-oriented research and training relating to the United Nations programme on crime prevention and criminal justice;

(c) To design and carry out training activities at the interregional level and, at the request of interested countries, at the national level;

(d) To promote the exchange of information by, inter alia, maintaining an international documentation centre on criminology and related disciplines to enable the Institute to respond to the need of the international community for the dissemination of information worldwide and to serve the needs of the United Nations and of scholars and other experts requiring such facilities.

¹⁶⁴ See generally UNITED NATIONS INTERREGIONAL CRIME AND JUSTICE RESEARCH INSTITUTE, WORK PROGRAMME 2005 (2005) available at <http://www.unicri.it/wwa/history/docs/WorkProgramme2005.pdf> (last visited Dec. 4, 2005) (describing several juvenile delinquency projects and human trafficking training events,

Its lack of any discernible post-conflict criminal justice reform function aside, other aspects of U.N.I.C.R.I.'s structure make its viability as the steward for the Project questionable. For example, U.N.I.C.R.I. receives its primary funding from the voluntary contributions of U.N. member states.¹⁶⁵ The lack of formal, direct funding from U.N. coffers signals the secondary status afforded U.N.I.C.R.I. in the United Nations' bureaucratic hierarchy.

Furthermore, the U.N.I.C.R.I. statute and its implementation effectively bury U.N.I.C.R.I. under thick U.N. bureaucracy. U.N.I.C.R.I. acts on the priorities established for it by the separate U.N. Commission on Crime Prevention and Criminal Justice (C.C.P.C.J.)¹⁶⁶ discussed below. U.N.I.C.R.I. reports to the U.N. Economic and Social Council through the C.C.P.C.J.¹⁶⁷ The U.N.I.C.R.I. statute directs U.N.I.C.R.I. to, "Establish and maintain a close consultative, co-operative, and working relationship with the Centre for Social Development

but no mention of broad-based post-conflict criminal justice reform projects). U.N.I.C.R.I. appears cognizant of the relatively narrow scope of its work, as it rather defensively states, "All this should not be conceived as an intentional, programmatic choice for specialization nor a too strict adherence to a 'niche' policy. It is the result of precise demand by donors and recipients and corresponds to the interest of the Institute to build upon its positive working experiences." *Id.* at para. I.

By way of confirmation, the U.N. Assistance Mission for Iraq Human Rights Office has had no contact with U.N.I.C.R.I., evincing little, if any, post-conflict criminal justice reform efforts. *See* E-mail from Mr. William Wiley, Human Rights Officer, U.N. Assistance Mission for Iraq, to MAJ Howard H. Hoege III, Student, 54th Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (24 Mar. 2006) (on file with author).

¹⁶⁵ *See* U.N.I.C.R.I. Statute, E.C.O.S.O.C. Res. 1989/56, art. VII (May 24, 1989) (available at http://unicri.it/wwa/structure/docs/UNICRI_STATUTE.pdf).

¹⁶⁶ *See* U.N.I.C.R.I. Statute, E.C.O.S. O.C. Res. 1989/56, art. IV (May 24, 1989) (available at http://unicri.it/wwa/structure/docs/UNICRI_STATUTE.pdf). *See also*, U.N.I.C.R.I. Report of Activities 2004, para. 2, <http://www.unicri.it/wwa/history/docs/ReportActivities2004.pdf> (last visited Dec. 4, 2005) (asserting that in practice, "The main substantive areas of U.N.I.C.R.I. action correspond to priorities selected by the Commission on Crime Prevention and Criminal Justice.").

¹⁶⁷ *See* U.N.I.C.R.I. Statute, E.C.O.S. O.C. Res. 1989/56, art. IV, para. 3(e) (May 24, 1989) (available at http://unicri.it/wwa/structure/docs/UNICRI_STATUTE.pdf).

and Humanitarian Affairs of the United Nations office at Vienna,”¹⁶⁸ a third formal relationship with another U.N. body. Finally, the U.N.I.C.R.I. mission statement compels U.N.I.C.R.I. to work closely with the U.N. Office on Drugs and Crime,¹⁶⁹ also discussed below.

According to its statute, U.N.I.C.R.I. must, “Carry out its activities in close collaboration and co-ordination with institutes and other bodies within and outside the United Nations system, especially with the United Nations regional institutes on the prevention of crime.”¹⁷⁰ U.N.I.C.R.I.’s broad collaboration and coordination requirement builds on top of the formal relationships discussed above evincing an organization better suited to responding to requests for assistance¹⁷¹ than leading the United Nations’ implementation of the project. Considering the lack of formalized U.N. funding of U.N.I.C.R.I., the absence of U.N.I.C.R.I. operations in the field of post-conflict criminal justice reform, and U.N.I.C.R.I.’s place near the bottom of the U.N. bureaucracy, U.N.I.C.R.I. represents an unlikely choice for stewardship of the Project.

¹⁶⁸ See U.N.I.C.R.I. Statute, E.C.O.S. O.C. Res. 1989/56, art. IX, para. 1 (May 24, 1989) (available at http://unicri.it/www/structure/docs/UNICRI_STATUTE.pdf).

¹⁶⁹ See UNICRI Structure: Mission Statement, <http://www.unicri.it/www/structure/mission.php> (last visited Dec. 4, 2005) (stating U.N.I.C.R.I. works particularly closely with the U.N.O.D.C.).

¹⁷⁰ See U.N.I.C.R.I. Statute, E.C.O.S. O.C. Res. 1989/56, art. II, para. 2 (May 24, 1989) (available at http://unicri.it/www/structure/docs/UNICRI_STATUTE.pdf).

¹⁷¹ Indeed, U.N.I.C.R.I. promotes itself as an organization standing ready to respond to requests for assistance. This makes sense, as U.N.I.C.R.I.’s operational and research agenda is set not only by C.C.P.C.J., but the particular requests of its donor nations. See UNITED NATIONS INTERREGIONAL CRIME AND JUSTICE RESEARCH INSTITUTE, WORK PROGRAMME 2005 para. 3 (2005), *available at* <http://www.unicri.it/www/history/docs/WorkProgramme2005.pdf> (last visited Dec. 4, 2005). In this capacity, U.N.I.C.R.I. must cater to its client base.

As noted above, U.N.I.C.R.I. works closely with the U.N. Office on Drugs and Crime (U.N.O.D.C.), a second U.N. organization with a criminal justice focus. The U.N.O.D.C. declares itself “a global leader in the fight against illicit drugs and international crime.”¹⁷² The U.N. Secretary General established the U.N.O.D.C. in its current form via a March, 2004 bulletin.¹⁷³ The U.N. Secretary General’s bulletin states:

The United Nations Office on Drugs and Crime is established to implement the Organization’s drug programme and crime programme in an integrated manner, addressing the interrelated issues of drug control, crime prevention and international terrorism in the context of sustainable development and human security.¹⁷⁴

Of particular note, the U.N.O.D.C. touts functional legal systems as a critical component to combating drug offenses.¹⁷⁵ To this end, U.N.O.D.C. has a criminal justice reform component.¹⁷⁶ In fact, three layers deep in the bureaucracy of the U.N.O.D.C. lies the Criminal Justice Reform Unit of the U.N.O.D.C.¹⁷⁷ The Criminal Justice Reform Unit

¹⁷² About Us, the United Nations Office on Drugs and Crime, <http://www.unodc.org/unodc/en/about.html> (last visited Dec. 5, 2005) (describing the mandate and a brief history of U.N.O.D.C. operations).

¹⁷³ See Bulletin, Secretary General, Organization of the United Nations Office on Drugs and Crime, U.N. Doc. ST/SGB/2004/6, para. 2.1 (Mar. 15, 2004).

¹⁷⁴ See Bulletin, Secretary General, Organization of the United Nations Office on Drugs and Crime, U.N. Doc. ST/SGB/2004/6, para. 2.1 (Mar. 15, 2004). Like U.N.I.C.R.I., U.N.O.D.C. acts, to a large degree, on priorities set for it by the C.C.P.C.J. See generally G.A. Res. 59/159, U.N. Doc. A/RES/59/159 (Feb. 3, 2005).

¹⁷⁵ Treaty and Legal Affairs, the United Nations Office on Drugs and Crime, http://www.unodc.org/unodc/en/treaty_and_legal_affairs.html (last visited Dec. 5, 2005) (describing the international legal framework within which the U.N.O.D.C. operates).

¹⁷⁶ See United Nations Office on Drugs and Crime: Criminal Justice Reform, http://www.unodc.org/unodc/en/criminal_justice.html (last visited Dec. 4, 2005).

¹⁷⁷ See United Nations Office on Drugs and Crime: Criminal Justice Reform, http://www.unodc.org/unodc/en/criminal_justice.html (last visited Dec. 4, 2005).

purportedly assists post-conflict nations with “building the capacity of their justice systems to operate more effectively within the framework of the rule of law.”¹⁷⁸ The second U.N. organization with a criminal justice focus, then, also holds promise vis-à-vis implementing the Project.

Indeed, unlike U.N.I.C.R.I., U.N.O.D.C.—through the Criminal Justice Reform Unit—actually advertises its involvement in four projects in Afghanistan: reform of the juvenile justice system, reform of the penitentiary system, reform of the prison system, and building criminal law and criminal justice capacity.¹⁷⁹ Unfortunately, a proper assessment of U.N.O.D.C. efforts in Afghanistan is, at best, difficult. To start, all of the Criminal Justice Reform Unit’s “tools and publications” relevant to the Afghanistan projects are, as of yet, “forthcoming.”¹⁸⁰ Similarly, after detailing the extensive technical assistance it provides in the context of penal reform, the U.N.O.D.C. concedes that the Criminal Justice Reform Unit “places an emphasis on inter-agency cooperation with other U.N. agencies providing technical assistance.”¹⁸¹ The Criminal Justice Reform Unit identifies several other U.N.

¹⁷⁸ See United Nations Office on Drugs and Crime: Criminal Justice Reform, http://www.unodc.org/unodc/en/criminal_justice.html (last visited Dec. 4, 2005).

¹⁷⁹ See Criminal Justice Reform – Projects, http://www.unodc.org/unodc/en/criminal_justice_projects.html (last visited Mar. 19, 2006).

¹⁸⁰ See Criminal Justice Reform – Tools and Publications, http://www.unodc.org/unodc/en/criminal_justice_tools.html (last visited Mar. 19, 2006). The following publications that would seem to guide the above-mentioned projects in Afghanistan are “forthcoming,” according to the Criminal Justice Reform Unit: Handbook on alternatives to imprisonment, handbook on restorative justice; U.N.O.D.C. field guides to penal reform, juvenile justice, and victim issues; criminal justice assessment tools/checklists; effective response to violence against women – a guide for law enforcement training; and training material on HIV/AIDS prevention in prison settings. See *id.*

¹⁸¹ See Criminal Justice Reform – Technical Assistance, http://www.unodc.org/unodc/en/criminal_justice_technical_assistance.html (last visited Mar. 19, 2006).

organizations, such as the Office of the High Commissioner on Human rights and U.N.I.C.E.F., to which the Unit provides support.¹⁸²

The above discussion paints a picture of another U.N. organization that promises much but, in fact, delivers little.¹⁸³ In the field of post-conflict criminal justice reform, U.N.O.D.C. may, in the future, have numerous resources available to guide reform, but those resources do not yet exist. Even though those resources will exist, the U.N.O.D.C. will not apparently be the U.N. organization using them, as the U.N.O.D.C. appears to subordinate its efforts to the leadership of other, more robust U.N. organizations like the Office of the High Commissioner on Human Rights and U.N.I.C.E.F.

U.N. General Assembly Resolution 59/159 indirectly explains the U.N.O.D.C. subordinate relationship to other U.N. organizations in the area of criminal justice system reform. Recall that U.N.O.D.C. is a global leader in the fight against drugs and crime. In

¹⁸² See Criminal Justice Reform – Inter-Agency Coordination, http://www.unodc.org/unodc/en/criminal_justice_interagency.html (last visited Mar. 19, 2006). Like many other U.N. organizations, the U.N.O.D.C. appears most comfortable directing its work toward the proliferation of conferences, declarations, statements, and the like. For example, the only well-developed documentation of U.N.O.D.C. activity publicly available is U.N.O.D.C.’s participation in and documentation of The Eleventh United Nations Congress on Crime Prevention and Criminal Justice. See United Nations Office on Drugs and Crime – The Eleventh United Nations Congress on Crime Prevention and Criminal Justice, http://www.unodc.org/unodc/en/crime_congress_11/index.html (last visited Dec. 4, 2005). While the U.N.O.D.C. posts the various reports and declarations resulting from the Congress, there is no evidence that the U.N.O.D.C. has expanded the reach of the principles guiding that Congress beyond the Bangkok convention center at which it was held.

¹⁸³ Again, the U.N. Assistance Mission for Iraq Human Rights Office has had no contact with U.N.O.D.C., evincing little, if any, post-conflict criminal justice reform efforts. One of the Mission’s Human Rights Officers vaguely recalls “a couple of concept papers” from the U.N.O.D.C. on the investigative capacity of Iraqi Police, but U.N.O.D.C. has not in any way acted on those papers, nor has it established contacts with the Mission. See E-mail from Mr. William Wiley, Human Rights Officer, U.N. Assistance Mission for Iraq, to MAJ Howard H. Hoege III, Student, 54th Graduate Course, The Judge Advocate General’s Legal Center and School, U.S. Army (24 Mar. 2006) (on file with author).

U.N. General Assembly Resolution 59/159, the U.N. General Assembly stressed, “the need for closer coordination and cooperation among States in combating crime in all its forms and manifestations, including criminal activities carried out for the purpose of furthering terrorism.”¹⁸⁴ The remainder of the Resolution focuses primarily on enhancing the world’s capacity for fighting transnational crime.¹⁸⁵ Indeed, the Resolution addresses almost exclusively this crime-fighting function of U.N.O.D.C.¹⁸⁶ The institutionalization of human rights standards, a complimentary, but slightly different goal of effective crime-fighting, receives only cursory attention in the Resolution.¹⁸⁷

¹⁸⁴ G.A. Res. 59/159, pmbl., U.N. Doc. A/RES/59/159 (Feb. 3, 2005).

¹⁸⁵ See generally G.A. Res. 59/159, *supra* note 184 (directing the better coordination between different criminal justice bodies of the U.N. system to combat growing transnational criminal activity).

¹⁸⁶ See e.g., G.A. Res. 59/159, *supra* note 184, ¶ 4-5 (focusing entirely on the crime prevention aspect of the U.N.O.D.C. mandate). Paragraphs 4 and 5 read:

4. *Reaffirms* the importance of the work of the United Nations Office on Drugs and Crime in the fulfillment of its mandate in crime prevention and criminal justice, including to prevent and combat terrorism in coordination with and complementing the work of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism, in particular in strengthening international cooperation and providing technical assistance, upon request;

5. *Reaffirms* also the role of the United Nations Office on Drugs and Crime in providing to Member States, upon request and as a matter of high priority, technical cooperation, advisory services and other forms of assistance in the field of crime prevention and criminal justice, including in the areas of prevention and control of transnational organized crime, corruption and terrorism as well as in the area of reconstruction of national criminal justice systems, and stresses the need to enhance its operational activities to assist, in particular, least developed countries, developing countries, countries with economies in transition and countries emerging from conflict. G.A. Res. 59/159, *supra* note 184, ¶ 4-5.

¹⁸⁷ See G.A. Res. 59/159, *supra* note 184, pmbl. The Resolution mentions “respect for human rights and the rule of law and promotion of the highest standards of fairness, humanity and professional conduct” in its preamble, book-ended by emphasis on the need for enhanced international cooperation to fight transnational crime. See *id.*

Consideration of U.N. General Assembly Resolution 59/159, taken with U.N.O.D.C.'s declared leadership role in the fight on global crime and its admitted support role on criminal justice reform, leads to the conclusion that U.N.O.D.C., like U.N.I.C.R.I., is an unlikely choice to steward the Project. Like U.N.I.C.R.I., ninety percent of U.N.O.D.C. funding comes from voluntary State contributions, evincing its secondary status within the U.N. bureaucracy.¹⁸⁸ Additionally, like U.N.I.C.R.I., U.N.O.D.C. possesses few, if any, examples of operational experience in the field of post-conflict criminal justice reform. In short, U.N.O.D.C. does not possess the current capacity to implement the Project.¹⁸⁹

Moving up the ladder of U.N. bureaucracy, the Commission on Crime Prevention and Criminal Justice (C.C.P.C.J.) focuses on implementing U.N. criminal justice standards and norms in criminal justice systems worldwide.¹⁹⁰ The U.N. Economic and Social Council

¹⁸⁸ See About Us, the United Nations Office on Drugs and Crime, <http://www.unodc.org/unodc/en/about.html> (last visited Dec. 5, 2005). See also G.A. Res. 59/159, *supra* note 184, ¶ 8 (inviting States to make voluntary contributions to the U.N. Crime Prevention and Criminal Justice Programme network, of which the U.N.O.D.C. is a part).

¹⁸⁹ A parting criticism of the U.N.O.D.C.: a recent C.C.P.C.J. session report curiously annotates, in very general terms, a conversation of obviously greater substance than reported:

In welcoming the increased transparency and dialogue with Member States...one speaker noted that the United Nations Office on Drugs and Crime needed to ensure that matters relating to the management and use of the United Nations Crime Prevention and Criminal Justice Fund were also transparent. The speaker also requested the Office to provide satisfactory answers to the remaining questions raised regarding the fund balance of the Fund. U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Report on the Thirteenth Session*, ¶ 162, U.N. Doc. E/CN.15/2004/16 (May 11-20, 2004).

¹⁹⁰ The Commission on Crime Prevention and Criminal Justice, http://www.unodc.org/unodc/en/crime_cicp_commission.html (last visited Dec. 5, 2005) (describing the mandate of the C.C.P.C.J.).

created the C.C.P.C.J. by adopting a two-paragraph resolution in February, 1992.¹⁹¹ In its authorizing Resolution, the U.N. Economic and Social Council assigns no tasks or responsibilities to the C.C.P.C.J.¹⁹² The Resolution vaguely references U.N. congresses on crime prevention, the coordination of which the C.C.P.C.J. has subsequently assumed responsibility.¹⁹³ Beyond its responsibility for these U.N. congresses, the C.C.P.C.J. “formulates international policies” and “offers nations a forum for exchanging information” on global crime-fighting.¹⁹⁴

Although it remains subordinate to the U.N. Economic and Social Council, the C.C.P.C.J. is a functional commission of such and enjoys the accompanying U.N. funding.¹⁹⁵ The C.C.P.C.J. therefore enjoys a position of greater weight within the U.N. bureaucracy than that of U.N.I.C.R.I. or U.N.O.D.C. The policy-formulation role of the C.C.P.C.J. also evinces a greater capacity to perform the critical tasks required by stewardship of the

¹⁹¹ See Establishment of the Commission on Crime Prevention and Criminal Justice, E.C.O.S.O.C. Res. 1992/1, para. 2(b), U.N. Doc. E/1992/92 (Feb. 6, 1992).

¹⁹² See *generally* Establishment of the Commission on Crime Prevention and Criminal Justice, E.C.O.S.O.C. Res. 1992/1, U.N. Doc. E/1992/92 (Feb. 6, 1992) (simply establishing the C.C.P.C.J. and endorsing the utility of U.N. congresses on crime prevention).

¹⁹³ See The Commission on Crime Prevention and Criminal Justice, http://www.unodc.org/unodc/en/crime_cicp_commission.html (last visited Dec. 5, 2005).

¹⁹⁴ See The Commission on Crime Prevention and Criminal Justice, http://www.unodc.org/unodc/en/crime_cicp_commission.html (last visited Dec. 5, 2005).

¹⁹⁵ See Establishment of the Commission on Crime Prevention and Criminal Justice, E.C.O.S.O.C. Res. 1992/1, para. 2(b), U.N. Doc. E/1992/92 (Feb. 6, 1992).

Project.¹⁹⁶ Consider, then, the actual performance of the C.C.P.C.J. in this policy-forming role.

The C.C.P.C.J. forms policy primarily through its work on the standards and norms in crime prevention and criminal justice.¹⁹⁷ The C.C.P.C.J. focus on standards and norms in crime prevention and criminal justice provides tremendous promise as precisely the type of substantive standard development required by the Project. Like the analysis above, however, scrutiny of the C.C.P.C.J.'s actual performance with respect to standards and norms reveals shortcomings. For example, the C.C.P.C.J. does not, in fact, draft or publish U.N. standards and norms in crime prevention and criminal justice.

Instead, the C.C.P.C.J. hosts meetings and writes reports discussing standards and norms.¹⁹⁸ The standards and norms themselves derive from a myriad of international conventions, U.N. body resolutions, conference declarations, and committee reports addressing every topic from safeguards for those individuals facing the death penalty to rules

¹⁹⁶ One of the C.C.P.C.J.'s functions, for example, is to draft the U.N. Economic and Social Council resolutions that guide the Centre for International Crime Prevention. See The Commission on Crime Prevention and Criminal Justice, http://www.unodc.org/unodc/en/crime_cicp_commission.html (last visited Dec. 5, 2005). This role demonstrates potential capacity to develop and disseminate the substantive standards of the Project, two of the four critical tasks required by the Project.

The author has intentionally left analysis of the Centre for International Crime Prevention outside the scope of this paper, as the C.C.P.C.J. executes its policies through the Centre, making the two essentially one body. See The Commission on Crime Prevention and Criminal Justice, http://www.unodc.org/unodc/en/crime_cicp_commission.html (last visited Dec. 5, 2005).

¹⁹⁷ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice*, ¶ 1, U.N. Doc. E/CN.15/2003/10 (Mar. 12, 2003).

¹⁹⁸ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice*, ¶ 3, U.N. Doc. E/CN.15/2003/10 (Mar. 12, 2003).

for the protection of juveniles deprived of their liberty to provisions for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property.¹⁹⁹ In its report on U.N. Standards and Norms in Crime Prevention and Criminal Justice, the C.C.P.C.J. catalogued responses it received from a smattering of nations on criminal justice reform efforts.²⁰⁰ The C.C.P.C.J. did not analyze these nation responses for trends, it did not comment on the relatively low response rate, and it did not detail efforts to continue the development of standards and norms in the future.²⁰¹

¹⁹⁹ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice: Addendum 1*, ¶ 28, U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003). Addendum 1 to the C.C.P.C.J.'s report on standards and norms captures a recommendation by a meeting of experts on the performance of the C.C.P.C.J.'s performance in the field of U.N. standards and norms for crime prevention and criminal justice. In paragraph 28 of Addendum 1, the experts advocate grouping the bewildering number of discrete sources of U.N. standards and norms into more manageable clusters. See *id.* The experts actually catalogue many of the various treaties, resolutions, declarations, and committee reports that the C.C.P.C.J. calls "U.N. standards and norms." See *id.* Unfortunately, this single paragraph, from a report on a meeting of experts not formally associated with the C.C.P.C.J., provides a more thorough list of U.N. standards and norms than any compilation that the C.C.P.C.J., the U.N. standard-bearer in this area, has provided.

²⁰⁰ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice*, ¶ 7, U.N. Doc. E/CN.15/2003/10 (Mar. 12, 2003). The C.C.P.C.J. asked for responses in five areas of criminal justice reform. See *id.* at para. 2. The greatest response to any section was fifteen States, the least response to any section was two States. To put the number of responses in perspective, the United Nations has 191 member states. See List of Member States, <http://www.un.org/Overview/unmember.html> (last visited Mar. 19, 2006).

²⁰¹ In fairness, the C.C.P.C.J. did include the following "concluding remarks" at the end of its report:

Information provided by Member States, agencies, and institutes indicate that the use and application of United Nations standards and norms in crime prevention and criminal justice resulted in changes and reforms being introduced in legal systems in many parts of the world with a view to upgrading and strengthening the capacity of criminal justice systems. The standard and norms will continue to be a valuable source of directives and guidelines against which administrations in various countries can assess their situations and reform needs. Efforts continue to be made to focus attention on the provision of technical cooperation and advisory services in the use and application of the standards and norms. Sustaining those efforts requires the support and involvement of Member States, intergovernmental and non-governmental organizations and relevant institutes. U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice*, ¶ 110, U.N. Doc. E/CN.15/2003/10 (Mar. 12, 2003).

The contemporaneous Meeting of Experts held to discuss U.N. standards and norms in criminal justice resulted in a rather accusatory report²⁰² on C.C.P.C.J.'s performance as the U.N. standard-bearer in the field of criminal justice. The experts questioned the veracity of the C.C.P.C.J.'s data on U.N. standards and norms implementation, as the reports of Member States on their own internal compliance provide the only source of data.²⁰³ The experts made a series of such fundamental recommendations for C.C.P.C.J. improvement, that the reader questions whether or not the C.C.P.C.J. has accomplished anything in the field of standards and norms of criminal justice. For example, the experts call for the C.C.P.C.J. to devote "appropriate time and resources"²⁰⁴ to U.N. standards and norms; to "focus on emerging practices in crime prevention and criminal justice;"²⁰⁵ to "focus on identifying difficulties"

These remarks are so general as to be misleading. For example, the C.C.P.C.J. concludes that "many parts of the world" use these standards and norms to reform criminal justice systems. Of the fifteen states responding to C.C.P.C.J.'s request for information on penal reform, however, only three said they based their reform on U.N. standards and norms. *See id.* at para. 8-21. The United States, for example, responded that it independently placed standards and norms on all aspects of criminal justice, long before the various sources of U.N. standards and norms surfaced. *See id.* at para. 21. Indeed, on the issue of standards and norms for restorative justice, only two nations responded, with only one citing U.N. standards and norms as the impetus for their reform. *See id.* at para. 94-96.

The concluding remarks, of course, also claim that "efforts continue to be made to focus attention" on how to use U.N. standards and norms. *See id.* at para. 110. The passive voice employed by the C.C.P.C.J. illuminates the fact that the identity of people or entities making those "efforts" and that the nature of those "efforts" remains a mystery. Without identifying who makes what type of efforts, the C.C.P.C.J.'s call for Member States and external organizations to assist the efforts rings empty.

²⁰² *See* U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice: Addendum 1*, ¶ 1, U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003).

²⁰³ *See* U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice: Addendum 1*, ¶ 1, U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003).

²⁰⁴ *See* U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice: Addendum 1*, ¶ 3(1), U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003).

and applying “technical assistance”²⁰⁶ in application of U.N. standards and norms; to share data to enhance cooperation on U.N. standards and norms;²⁰⁷ to tie U.N. standards and norms to the main U.N. “programme priorities;”²⁰⁸ and to request States and organizations to support criminal justice reforms.²⁰⁹

Unlike U.N.I.C.R.I. and U.N.O.D.C., both of which conduct operations daily, year-round, the C.C.P.C.J. only meets in one, eight-day session each year.²¹⁰ The task of implementing even a few of the expert recommendations discussed above, to say nothing of the critical tasks associated with the Project, seems daunting at best, given that the C.C.P.C.J. will enjoy only a handful of days a year to do so. As noted above, however, C.C.P.C.J. priorities guide, to some degree, the daily operations of U.N. bodies like U.N.I.C.R.I. and U.N.O.D.C. Despite the theoretical ability to marshal the resources and efforts of these other U.N. bodies both to improve C.C.P.C.J. performance and, potentially, to implement the

²⁰⁵ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice: Addendum 1*, ¶ 3(2), U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003).

²⁰⁶ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice: Addendum 1*, ¶ 3(4), U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003).

²⁰⁷ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice: Addendum 1*, ¶ 3(5), U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003).

²⁰⁸ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice: Addendum 1*, ¶ 3(6), U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003).

²⁰⁹ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice: Addendum 1*, ¶ 3(9), U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003).

²¹⁰ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Report on the Thirteenth Session*, ¶ 155, U.N. Doc. E/CN.15/2004/16 (May 11-20, 2004)

Project, the practical reality remains that these other U.N. bodies have several institutional problems of their own.²¹¹ Sadly, the C.C.P.C.J. serves as a third example of a U.N. organization superficially matched, but substantively unsuited, for stewardship of the Project.

Interestingly, further consideration of both the C.C.P.C.J. and Meeting of Experts reports discussed above provides a glimpse of a potentially acceptable U.N. organization to steward the Project. The C.C.P.C.J. devoted a section of its report to cooperation between some U.N. organizations in the field of U.N. standards and norms in crime prevention and criminal justice.²¹² As an example of such cooperation, the C.C.P.C.J. highlighted a panel on juvenile justice organized not by C.C.P.C.J., U.N.O.D.C., or U.N.I.C.R.I., but by the U.N. Office of the High Commissioner for Human Rights (O.H.C.H.R.).²¹³ Unsurprisingly, the O.H.C.H.R. is very involved in aspects of criminal justice and the reform of criminal justice systems globally.

²¹¹ In fact, the accusatory tone of the Meeting of Experts report towards the C.C.P.C.J. turned even more sour towards the failings of the U.N.O.D.C. In the words of the experts, the U.N.O.D.C. “had a long way to go” to bring practical utility to U.N. standards and norms in criminal justice. See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice: Addendum 1*, ¶ 18, U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003).

²¹² See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice*, ¶ 109, U.N. Doc. E/CN.15/2003/10 (Mar. 12, 2003).

²¹³ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice*, ¶ 109(a), U.N. Doc. E/CN.15/2003/10 (Mar. 12, 2003). According to the C.C.P.C.J. report, however, the U.N.O.D.C. did participate in the panel. See *id.* See also U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice, Addendum 1*, ¶ 15, U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003) (drawing attention to O.H.C.H.R.’s efforts to issue its own reports on several U.N. standards and norms in criminal justice and to use those standards and norms when evaluating human rights complaints).

The Meeting of Experts report shows that O.H.C.H.R. involvement in U.N. criminal justice standards and norms reaches beyond simply holding conferences and publishing reports. The experts identified “a growing area of direct application of the standards and norms” in U.N. peacekeeping missions and post-conflict reconstruction efforts.²¹⁴ As a practical matter, the O.H.C.H.R. staffs a human rights section within virtually every U.N. peacekeeping mission.²¹⁵ The O.H.C.H.R. “field offices” can perform a number of tasks, to include both monitoring criminal justice systems for compliance with human rights

²¹⁴ See U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice, Addendum 1*, ¶ 15, U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003). The experts incorporate U.N. standards and norms in criminal justice in the broader notion of the rule of law:

It was noted that in efforts to restore a functioning economy, create a free and fair political system and strengthen the development of civil society [in areas of ongoing U.N. peacekeeping missions or post-conflict reconstruction], the rule of law had to first be established. The rule of law was a paramount consideration for the participation of the local community in the justice system. *See id.*

The relationship between U.N. standards and norms in criminal justice and the rule of law will be important in the discussion, *infra* about the impact of the Project’s substantive standards in criminal justice system reform on U.S. military operations that embrace the establishment of the rule of law in post-conflict societies as key strategic goal.

²¹⁵ See, e.g. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, ARAB REGION QUARTERLY REPORTS OF FIELD OFFICES 17 (June 2005) (detailing the work of the O.H.C.H.R. personnel working in the U.N. Assistance Mission for Iraq and elsewhere in the Middle East). See also Human Rights Components of U.N. Peace Missions, <http://www.ohchr.org/english/countries/field/hrc.htm> (last visited Dec. 4, 2005) (displaying both a map and a chart of every U.N. mission that contains a human rights section); O.H.C.H.R. in the Field, <http://www.ohchr.org/english/countries/field/index.htm> (last visited Dec. 4, 2005) (explaining the human rights section as a vehicle by which O.H.C.H.R. brings its presence to the field); Louise Arbour, U.N. High Commissioner for Human Rights, Address at the 2004 Heads of Field Presences Meeting: Protecting Human Rights: Charting the Way Forward (Nov. 22, 2004) (emphasizing the need for an active, substantive relationship between human rights sections in the field and the U.N. Country Teams they support in the context of a given U.N. mission).

The existing relationship between the O.H.C.H.R. and both the Department for Peacekeeping Operations, the U.N. headquarters for the U.N. missions that O.H.C.H.R. supports, and the U.N. Security Council that authorizes those missions, presents tremendous opportunities for implementation of the Project and will be discussed in greater detail *infra* in the discussion of the Project’s substantive provisions.

standards²¹⁶ and assisting host governments with implementing human rights standards generally.²¹⁷ Furthermore, the O.H.C.H.R., unlike the other three U.N. organizations discussed above, can point to several examples of its involvement in criminal justice issues in post-conflict areas such as Iraq,²¹⁸ Afghanistan,²¹⁹ and throughout Africa.²²⁰

²¹⁶ See OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, ARAB REGION QUARTERLY REPORTS OF FIELD OFFICES 17 (June 2005) (identifying reports of ongoing torture and abuse of prisoners perpetrated by Iraqi police).

²¹⁷ See OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, ARAB REGION QUARTERLY REPORTS OF FIELD OFFICES 18 (June 2005) (describing field office work with Iraqi institutions to implement the Human Rights Programme for Iraq).

²¹⁸ See U.N. Office of the High Commissioner for Human Rights, U.N.A.M.I. Human Rights Office, *Building and Strengthening the National Human Rights Protection System in Iraq: The Human Rights Programme*, 48-55 (May 31, 2005) (outlining the criminal justice system reform efforts both planned and underway, led or facilitated by the U.N. Assistance Mission for Iraq (U.N.A.M.I.)).

²¹⁹ See generally U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Promotion and Protection of Human Rights: Study by the Office of the United Nations High Commissioner for Human Rights on human rights and transitional justice activities undertaken by the human rights components of the United Nations system*, U.N. Doc. E/CN.4/2006/93 (Feb. 7, 2006) (detailing the “transitional justice” activities of U.N. human rights field presences, including criminal justice reform efforts in Afghanistan). The term “transitional justice” does not precisely define the concept of criminal justice reform in an occupied territory contemplated by the discussion and analysis in this paper. “Transitional justice” encompasses more than simply bringing the failed criminal justice system of an occupied territory or, more broadly, a post-conflict territory, into compliance with international human rights standards:

The notion of “transitional justice”...comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof. The Secretary-General, *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 8, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004).

The focus of the subsequent analysis in this paper is squarely on the “institutional reform” component of the much larger notion of “transitional justice.”

²²⁰ See generally U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Promotion and Protection of Human Rights: Study by the Office of the United Nations High Commissioner for Human Rights on human rights and transitional justice activities undertaken by the human rights components of the United Nations system*, U.N. Doc. E/CN.4/2006/93 (Feb. 7, 2006) (detailing the “transitional justice” activities of U.N. human rights field presences, including criminal justice reform efforts throughout Africa).

The O.H.C.H.R. supports its global field presence with substantial complimentary efforts attending to the human rights standards applicable in any given state's criminal justice system.²²¹ Through its National Institutions Activities, for example, the O.H.C.H.R. sponsors and coordinates global efforts to establish, strengthen, and network national human rights institutions at the country level.²²² The training materials, conferences, and meetings employed by the National Institutions Activities necessarily incorporate standards and practices relating to the judiciary.²²³

In short, the O.H.C.H.R. has accomplished what other U.N. organizations purporting to deal in criminal justice reform have not: establishing a base of human rights expertise in the field of criminal justice and developing the far-reaching mechanism of delivering that expertise to nations world-wide. As an organization, the O.H.C.H.R. also exhibits characteristics superior to the three U.N. organizations discussed above. The High Commissioner for Human Rights wears the rank of Under-Secretary-General,²²⁴ giving the office relatively substantial weight within the United Nations. Indeed, the U.N. General

²²¹ Office of the High Commissioner for Human Rights, Mission Statement, <http://www.ohchr.org/english/about/mission.htm> (last visited Dec. 5, 2005) (describing O.H.C.H.R. work with "governments, national institutions, civil society...to develop...capacity...for the promotion" of human rights).

²²² See U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, NATIONAL INSTITUTIONS ACTIVITIES, FIRST QUARTERLY PUBLIC REPORT FOR 2005 5 (2005).

²²³ See generally U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, NATIONAL INSTITUTIONS ACTIVITIES, FIRST QUARTERLY PUBLIC REPORT FOR 2005 (2005) (describing efforts to support national human rights institutions with materials relating to torture prevention, the judiciary, etc.); U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, NATIONAL INSTITUTIONS ACTIVITIES, SECOND QUARTERLY PUBLIC REPORT FOR 2005 (2005) (describing efforts to support national human rights institutions with materials relating to torture prevention, the judiciary, etc.).

²²⁴ G.A. Res. 48/141, ¶ 2(c), U.N. Doc. A/RES/48/141 (Dec. 20, 1993).

Assembly itself gave life to the O.H.C.H.R., contrary to the other three U.N. organizations discussed above, each born of the U.N. bureaucracy that currently owns it.²²⁵

Promisingly, the U.N. General Assembly's mandate to the O.H.C.H.R., unlike those of the three U.N. organizations discussed above, directs the O.H.C.H.R. to perform the very balancing act required by the conflict of laws inherent during a belligerent occupation: balancing the preservation of state sovereignty against the protection of human rights and one treaty obligation against a competing treaty obligation.²²⁶ The U.N. General Assembly tells the O.H.C.H.R.:

Function within the framework of the Charter of the United Nations, the Universal Declaration of Human Rights, other international instruments of human rights and international law, including the obligations, within this framework, to respect the sovereignty, territorial integrity and domestic jurisdiction of States and to promote the universal respect for and observance of all human rights, in the recognition that in the framework of the purposes and principles of the Charter, the promotion and protection of all human rights is a legitimate concern of the international community.²²⁷

Of course, actual O.H.C.H.R. performance should receive some critical scrutiny as well. Although the O.H.C.H.R. field offices work criminal justice reform in numerous post-conflict societies, the human rights personnel within those field offices use anything but common U.N. standards and norms in criminal justice to govern their work. For example,

²²⁵ G.A. Res. 48/141, ¶ 1, U.N. Doc. A/RES/48/141 (Dec. 20, 1993).

²²⁶ The reader will see that the I.L.C. has a complimentary mandate to interpret treaty obligations and identify those areas of international law requiring reconciliation. Shortly, the analysis will recommend a partnership between the O.H.C.H.R. and the I.L.C. to develop the substantive provisions of the Project.

²²⁷ G.A. Res. 48/141, ¶ 3(a), U.N. Doc. A/RES/48/141 (Dec. 20, 1993).

the U.N. Assistance Mission for Iraq (U.N.A.M.I.) recently planned and executed human rights training for several senior members of Iraq's Ministry of the Interior on criminal justice topics such as protecting fundamental freedoms during police work, anti-corruption measures, and international and domestic human rights law.²²⁸ The human rights personnel recruited a number of instructors with expertise in the topics covered, but followed no particular protocol with respect to what U.N. standards and norms the training should cover.²²⁹ The invited speakers essentially set the substantive standards of the training by their independent topical coverage.²³⁰

The Meeting of Experts discussed above expressed some concern over this particular observation that:

Each of those [participants in peacekeeping operations] participated in the operations with a slightly different perception of what the rule of law was in practice and a greater difference in perception of what the United Nations standards and norms in crime prevention and criminal justice contained

²²⁸ Telephone Interview with William H. Wiley, Human Rights Officer, U.N. Assistance Mission for Iraq, in Amman, Jordan (Mar. 7, 2006). *See also* Agenda, Leadership of Citizens in Uniform, Iraq Ministry of Interior, Mar. 4-9, 2006 (On file with author) (identifying the coursework and instructors for Human Rights Office/U.N.A.M.I.-sponsored training).

²²⁹ Telephone Interview with William H. Wiley, Human Rights Officer, U.N. Assistance Mission for Iraq, in Amman, Jordan (Mar. 7, 2006) (explaining that the focus of the training, from the U.N.A.M.I. human rights office perspective, was to foster some networking among all participants, test the logistical arrangements for future conferences (to include security), and to query the Iraqi officials about concerns that they had with their criminal justice system). The stated objectives of the U.N.A.M.I. conference are surely legitimate—the observation concerning the substance of the speakers' presentations is meant simply to highlight the relative absence of O.H.C.H.R.-driven substantive standards in the field of criminal justice reform.

²³⁰ *See* Instructor Biographies, Leadership of Citizens in Uniform, Iraq Ministry of Interior, Mar. 4-9, 2006 (On file with author).

(assuming that the individual in question was even aware of their existence).²³¹

Recall, however, that in criticizing the lack of common U.N. standards and norms in criminal justice from one peacekeeping operation to the next, the Meeting of Experts were, in fact, concerned with the nearly absent consolidation and dissemination of U.N. standards and norms by the U.N. criminal justice bodies, not on the competence of peacekeeping personnel. The absence of O.H.C.H.R.-driven standards and norms in the field of criminal justice reform, therefore, does not loom as large as the failings of the three previously discussed U.N. organizations. The O.H.C.H.R. has the expertise, infrastructure, and experience to consolidate and disseminate U.N. standards and norms in criminal justice, it just accomplishes those tasks with inconsistent substantive standards. The Project, then, represents the opportunity for the O.H.C.H.R. to simply standardize its message.

“Simply standardizing its message,” may oversimplify a particular challenge in reconciling the conflicting provisions of the law of belligerent occupation presented by the Project. Although the O.H.C.H.R. mandate articulated a need to consider international legal obligations during the course of O.H.C.H.R. activities,²³² the task of interpreting conflicting treaty provisions may exceed both the technical capacity and the mandate of the O.H.C.H.R. Therefore, a final U.N. organization warrants mention to compensate for this potential

²³¹ U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice: Addendum I*, ¶ 17, U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003).

²³² See G.A. Res. 48/141, ¶ 3(a), U.N. Doc. A/RES/48/141 (Dec. 20, 1993).

shortfall in the O.H.C.H.R. capacity to perform the critical tasks necessary to implement the Project.

The U.N. Secretary General's Office of Legal Affairs performs a number of functions, to include providing, upon request, interpretations of a State's obligations pursuant to any of the hundreds of treaties deposited in its office.²³³ These interpretations are not legally binding on the State.²³⁴ The Office of Legal Affairs accomplishes this particular mission through its Codification Division, and more specifically, the International Law Commission (I.L.C.).²³⁵

The U.N. General Assembly adopted the Statute of the International Law Commission in 1947.²³⁶ The I.L.C. Statute requires the I.L.C. to promote both the development and codification of international law.²³⁷ Of particular relevance to the Project, “‘Codification of international law’ is used for convenience as meaning the more precise formulation and systemization of rules of international law in fields where there already has

²³³ See U.N. Office of Legal Affairs, Treaty Section—Technical Assistance, <http://www.untreaty.un.org/ola-internet/Assistance/Section1.htm> (last visited Dec. 7, 2005) (describing the mandate, assistance, and tools for assisting governments in “treaty law and related matters”).

²³⁴ See U.N. Office of Legal Affairs, Treaty Section—Technical Assistance, <http://www.untreaty.un.org/ola-internet/Assistance/Section1.htm> (last visited Dec. 7, 2005) (describing the mandate, assistance, and tools for assisting governments in “treaty law and related matters”).

²³⁵ See International Law Commission: Introduction, <http://www.un.org/law/ilc/ilcintro.htm> (last visited Jan. 30, 2006).

²³⁶ See G.A. Res. 174 (II), pmbl., U.N. Doc. A/CN.4/4 (Nov. 21, 1947).

²³⁷ See U.N.G.A., THE STATUTE OF THE INTERNATIONAL LAW COMMISSION, at 1, U.N. Doc. A/CN.4/4/Rev. 2, U.N. Sales No. E.82.V.8 (1982).

been extensive State practice, precedent and doctrine.”²³⁸ The I.L.C. Statute reads as though the U.N. General Assembly drafted it precisely for the development of the Project’s substantive standards.

As indicated above, however, the U.N. General Assembly, a Member State, or some other entity must generally nudge the I.L.C. into action before it will codify any specific rules of international law.²³⁹ So, for example, the U.N. General Assembly could refer to the I.L.C. a matter such as the apparent inconsistencies between international humanitarian law, international human rights law, and specific U.N. Security Council Resolutions on the question of an occupying force’s authority to reform the occupied territory’s criminal justice system. The I.L.C. Statute compels the I.L.C. to give a U.N. General Assembly referral priority over other tasks before the I.L.C.²⁴⁰

After receiving the issue presented to it, the I.L.C. develops a plan of work to resolve the issue.²⁴¹ This plan of work may include co-operation and consultation with any U.N.

²³⁸ U.N.G.A., THE STATUTE OF THE INTERNATIONAL LAW COMMISSION, at 3, U.N. Doc. A/CN.4/4/Rev. 2, U.N. Sales No. E.82.V.8 (1982).

²³⁹ Article 18 of the I.L.C. Statute permits the I.L.C. to “survey the whole field of international law” and select the most pressing international legal issues for codification. *See* U.N.G.A., THE STATUTE OF THE INTERNATIONAL LAW COMMISSION, at 5, U.N. Doc. A/CN.4/4/Rev. 2, U.N. Sales No. E.82.V.8 (1982). As a practical matter, however, the I.L.C. will shy away from independent action on politically sensitive topics. *See* LUKE LEE, THE INTERNATIONAL LAW COMMISSION REEXAMINED 554 (). The rules governing an occupying force certainly qualifies as politically sensitive, making independent I.L.C. action unlikely. E-mail from Mr. Michael J. Matheson, Member, International Law Commission, to MAJ Howard H. Hoege III, Student, 54th Graduate Course, The Judge Advocate General’s Legal Center & School, U.S. Army (8 Feb. 2006) (on file with author).

²⁴⁰ *See* U.N.G.A., THE STATUTE OF THE INTERNATIONAL LAW COMMISSION, at 5, U.N. Doc. A/CN.4/4/Rev. 2, U.N. Sales No. E.82.V.8 (1982).

²⁴¹ *See* U.N.G.A., THE STATUTE OF THE INTERNATIONAL LAW COMMISSION, at 5, U.N. Doc. A/CN.4/4/Rev. 2, U.N. Sales No. E.82.V.8 (1982).

organization “on any subject within the competence of that [organization].”²⁴² In its plan of action for the Project, then, the I.L.C. mandate would permit the I.L.C. to work closely with the O.H.C.H.R. and any of the three other U.N. organizations carrying the U.N. criminal justice label. After consideration of the issue and consultation with other U.N. organizations, the I.L.C. already employs a publication mechanism whereby the U.N. Secretary General circulates I.L.C. draft reports or articles to all Member States.²⁴³ The I.L.C. ultimately returns the draft report or articles to the U.N. General Assembly for any one of a number of actions, to include no action or adoption as a resolution.²⁴⁴

While the I.L.C. codification function holds promise as a mechanism for developing the substantive provisions of the Project, one might ask why the O.H.C.H.R. could not perform this relatively simple function. Two unique characteristics of the I.L.C. make it the preferable U.N. organization to perform the codification function vis-à-vis the Project. First, as identified above, to arrive at the substantive provisions of the Project, the designated U.N. organization must do more than select and consolidate a list of discrete international human rights provisions. The designated U.N. organization must choose from appropriate canons of

²⁴² See U.N.G.A., THE STATUTE OF THE INTERNATIONAL LAW COMMISSION, at 7, U.N. Doc. A/CN.4/4/Rev. 2, U.N. Sales No. E.82.V.8 (1982). As a practical matter, the I.L.C. does periodically work with other U.N. organizations. See E-mail from Mr. Michael J. Matheson, Member, International Law Commission, to MAJ Howard H. Hoege III, Student, 54th Graduate Course, The Judge Advocate General’s Legal Center & School, U.S. Army (8 Feb. 2006) (on file with author).

²⁴³ See U.N.G.A., THE STATUTE OF THE INTERNATIONAL LAW COMMISSION, at 6, U.N. Doc. A/CN.4/4/Rev. 2, U.N. Sales No. E.82.V.8 (1982).

²⁴⁴ See U.N.G.A., THE STATUTE OF THE INTERNATIONAL LAW COMMISSION, at 6, U.N. Doc. A/CN.4/4/Rev. 2, U.N. Sales No. E.82.V.8 (1982). In the instance of no action at the U.N. General Assembly, the prior publication of an I.L.C. report might make subsequent U.N. General Assembly action unnecessary. See *id.*; see also OFFICE OF PUBLIC INFORMATION, THE UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 9 (1967).

treaty interpretation and must balance competing treaty principles against one another. The I.L.C., unlike any other U.N. organization, has devoted space within its long-term work program to study these complex issues of treaty interpretation and application.²⁴⁵

Second, the experts serving on the I.L.C. focus exclusively on language and drafting in the context of binding international legal regimes.²⁴⁶ O.H.C.H.R. focus is, at best, split between drafting useful human rights rules and executing its robust operational function. To be sure, O.H.C.H.R. participation in the development of the Project's substantive provisions adds tremendous pragmatic value. In a consultative role during the drafting phase of the Project, the O.H.C.H.R. can ensure that the I.L.C.-drafted provisions will be easily implemented when the O.H.C.H.R. assumes operational stewardship of the provisions. The I.L.C., however, should craft the language of those provisions.

The O.H.C.H.R., then, will serve as the steward of the U.N. Post-Conflict Criminal Justice Reform Project. Choosing the O.H.C.H.R. makes sense because it has developed a substantive expertise and an operational capability far beyond any other U.N. organization operating in the field of criminal justice reform. The O.H.C.H.R. already operates under a directive to consider its human rights responsibilities in light of difficult notions of state

²⁴⁵ See International Law Commission, *Report of the International Law Commission: Fifty-Seventh Session (2 May-3 June and 11 July-5 August 2005)*, ¶ 442, U.N. Doc. A/60/10 (2005). The I.L.C. calls its study the "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law." See *id.* at ¶ 439. As part of the study, the I.L.C. will consider topics such as hierarchy in international law, the "interpretation of treaties in the light of 'any relevant rules of international law applicable in the relations between parties,'" and the "application of successive treaties relating to the same subject matter." See *id.* ¶ 442.

²⁴⁶ See generally LUKE T. LEE, *THE INTERNATIONAL LAW COMMISSION RE-EXAMINED* 553 (1965) (describing the assessment of U.S. and British diplomats at the establishment of the I.L.C. that it be composed of international law experts as a way to enhance I.L.C. utility).

sovereignty. The O.H.C.H.R. position within the U.N. bureaucracy gives it superior authority. Finally, the I.L.C. Statute allows the easy augmentation of the O.H.C.H.R. at the point of actually drafting the Project's substantive standards. Incorporating the I.L.C. will ensure that the substantive provisions of the Project reflect both international standards of treaty interpretation and principles from international humanitarian law and the U.N. Charter as well as international human rights law.

3. *Developing the Substantive Provisions of the Post-Conflict Criminal Justice Reform Project.*

With ultimate responsibility for the Project fixed on the O.H.C.H.R., the business of developing substantive provisions begins. As a threshold matter, initiating the Project within the U.N. will require at least one Member State to shepherd the Project through the initial stages of drafting substantive provisions. For purposes of the remaining analysis, the United States will act as the Project's champion.²⁴⁷ The United States can initiate the Project in one of two ways.

The United States could develop a proposal for the Project, outlined below, and proceed directly to the I.L.C., requesting it to develop a report confirming the Project's

²⁴⁷ The subsequent discussion in Subsection C *infra* describes two reasons that the United States might willingly accept this role: its consistent practice of conducting U.S. diplomacy inside the halls of the United Nations and its efforts to bolster the legitimacy of U.S. foreign policy. *See also* Harlan Cleveland, *Can We Revive the United Nations?*, in *THE UNITED NATIONS IN PERSPECTIVE* 64, 73 (E. Berkeley Tompkins ed., 1972) (calling for a "consortium of the concerned," a core of states led by the United States that would shepherd the United Nations into firmer action, efforts to reform, and building legitimacy). For now, however, the analysis simply depends on a State pushing the Project through the various U.N. procedural gates.

international legal footing.²⁴⁸ Alternatively, the United States could take the same proposal to the U.N. General Assembly and lobby for its adoption as a U.N. General Assembly Resolution referring the proposal to the I.L.C. The United States should pursue the latter method of spurring I.L.C. action on the Project for several reasons.

First, the I.L.C. task in this case will not be to draft the Project's substantive provisions from whole cloth, but to essentially evaluate and approve the proposal outlined below. The I.L.C. has, in the past, completed special assignments like evaluating particular texts or proposals such as the Project's substantive provisions, but the request to do so has historically originated from the U.N. General Assembly.²⁴⁹ Departure from precedent in this case could lead the politically sensitive I.L.C. to decline including the Project in its programme of work.²⁵⁰

²⁴⁸ See OFFICE OF PUBLIC INFORMATION, THE UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 9 (1967); *see also* International Law Commission, Programme and Methods of Work, <http://www.un.org/law/ilc/program.htm> (last visited Jan. 30, 2006). In this scenario, the I.L.C. would appoint a special rapporteur and develop an appropriate plan of work. See OFFICE OF PUBLIC INFORMATION, THE UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 9 (1967). While the I.L.C. ordinarily drafts its provisions, articles, and reports *de novo*, the I.L.C. has broad latitude to develop whatever method of work it deems most appropriate. See OFFICE OF PUBLIC INFORMATION, THE UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 12 (1967).

²⁴⁹ See OFFICE OF PUBLIC INFORMATION, THE UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 12 (1967).

²⁵⁰ See generally E-mail from Mr. Michael J. Matheson, Member, International Law Commission, to MAJ Howard H. Hoege III, Student, 54th Graduate Course, The Judge Advocate General's Legal Center & School, U.S. Army (8 Feb. 2006) (on file with author) (indicating that the I.L.C. is not generally inclined to tackle politically sensitive topics).

Second, the I.L.C. must give priority to assignments it receives from the U.N. General Assembly,²⁵¹ helping to speed what could potentially become a lengthy process of drafting.²⁵² Third, the exercise of lobbying the U.N. General Assembly to adopt a resolution referring the Project to the I.L.C. provides the opportunity to build international political support for the idea of the Project before it arrives at the I.L.C. The members of the I.L.C. are not direct representatives of the governments that nominated them.²⁵³ While their native governments can certainly still influence I.L.C. members, the members serve on the Commission in their personal capacity, at least theoretically.²⁵⁴ The political momentum of a U.N. General Assembly referral might emphasize the Project's importance to a greater degree than the individual request of a Member State.

Having settled on the U.N. General Assembly route for tasking the I.L.C., the U.N. General Assembly resolution that will ultimately refer the Project to the I.L.C. should contain the following procedural guidance for the I.L.C. First, the Resolution should use its preamble to acknowledge the unsettled state of the law of belligerent occupation with respect to an occupying force's ability to reform the failed criminal justice system of an occupied territory. The preamble should also announce both the inception of the Project and the

²⁵¹ See U.N.G.A., THE STATUTE OF THE INTERNATIONAL LAW COMMISSION, at 5, U.N. Doc. A/CN.4/4/Rev. 2, U.N. Sales No. E.82.V.8 (1982).

²⁵² The I.L.C. holds two month-long meetings constituting its annual session, so the Project will not receive daily attention during the drafting of its substantive provisions. See International Law Commission, Programme and Methods of Work, <http://www.un.org/law/ilc/program.htm> (last visited Jan. 30, 2006); see also LUKE T. LEE, THE INTERNATIONAL LAW COMMISSION RE-EXAMINED 551 (1965) (observing that the process of concluding I.L.C. work can often take a long time).

²⁵³ See LEE, *supra* note 246, at 550.

²⁵⁴ See *id.*

Project's purpose of establishing an ordering principle in this unsettled area of international law.

Second, the Resolution should request the I.L.C. to work closely with the O.H.C.H.R. and any U.N. criminal justice body that might have projects underway to devise standards for criminal justice reform in an occupied territory.²⁵⁵ Third, the Resolution should request that the I.L.C. review the proposed substantive provisions of the Project and provide comments, conclusions, and recommended revisions in the form of a published report. Finally, the Resolution should assign the responsibility for stewardship of the Project to the O.H.C.H.R., giving the O.H.C.H.R. primacy among all of the relevant U.N. organizations purporting to address post-conflict criminal justice system reform.

When the I.L.C. returns its report to the U.N. General Assembly, the United States should lead the effort to adopt the report in a U.N. General Assembly Resolution titled "The U.N. Post-Conflict Criminal Justice Reform Project." This Resolution, then, will serve as the base document guiding the future implementation of the Project's substantive provisions. To this point in the discussion, one should recognize that the Project simply exploits the procedures already present within the U.N. system. The subsequent discussion will detail how the Resolution will be used, by whom the Resolution will be used, and what substance the Resolution will contain.

²⁵⁵ Recall that the I.L.C. Statute permits this type of collaboration with other U.N. organizations. See U.N.G.A., THE STATUTE OF THE INTERNATIONAL LAW COMMISSION, at 7, U.N. Doc. A/CN.4/4/Rev. 2, U.N. Sales No. E.82.V.8 (1982).

a. *The Trigger.*

The U.N. General Assembly Resolution memorializing the I.L.C. and O.H.C.H.R. work on the Project sets the stage for the United Nations to achieve the central purpose of the Project: establish order among the three competing sources of international law purporting to govern the occupying force's ability to reform the failed criminal justice system of the occupied territory. The Resolution, of course, has no binding effect itself. Importantly, though, it captures the agreement of Member States on an acceptable reconciliation of the competing principles and provisions of these sources of international law. The reconciliation of these three sources of international law is fully realized at the moment when the Project's substantive provisions are triggered.

The substantive provisions of the Project will not apply until such time as the U.N. Security Council adopts them in an authorizing U.N. Security Council Resolution. Again, the U.N. Security Council will not have to adjust its ordinary course of business to trigger the Project's substantive provisions. Remember that an occupation, in general terms, either follows international armed conflict or occurs when the occupying force enters and then moves across the occupied territory.²⁵⁶ Either situation crosses the "threat to international peace and security" threshold, inviting U.N. Security Council action to resolve or manage the conflict.²⁵⁷ So, as an occupation commences, when we expect the Project's substantive

²⁵⁶ Geneva Convention IV, *supra* note 24, art. 2 & 6.

²⁵⁷ U.N. Charter art. 39.

provisions to apply, the U.N. Security Council will either already be seized of the matter or will be well over the Article 39 hurdle to become seized of the matter.

The U.N. Security Council Resolution dealing with this threat to international peace and security can immediately clarify the very first problem identified in the law of belligerent occupation: identifying the start of the occupation. The U.N. Security Council Resolution simply declares the existence of the occupation, essentially resolving the question as an international legal matter.²⁵⁸ Along with whatever other provisions the U.N. Security Council deems necessary to include in its Authorizing Resolution, it need only incorporate expressly or by reference the U.N. General Assembly Resolution memorializing the Project's substantive provisions. By incorporating these provisions, the U.N. Security Council in one step reconciles and gives effect to the law of belligerent occupation relative to the occupying force's efforts to reform the failed criminal justice system of the occupied territory.²⁵⁹

²⁵⁸ See Steven R. Ratner, *The Security Council and International Law*, in *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 591, 602 (David M. Malone ed., 2004). The U.N. Security Council essentially declared an occupation in Iraq in U.N.S.C.R. 1483:

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council...and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers. S.C. Res. 1483, *supra* note 30, pmbl.

²⁵⁹ One author puts it this way: "The Charter does not charge the Council with enforcing extra-Charter law, but the Council's members have done so on numerous occasions." Ratner, *supra* note 258, at 601. Although U.N. Security Council action ordinarily conjures thoughts of ad hoc resolutions attending to international peace and security, the U.N. Security Council may also invoke extra-Charter treaties to bind the objects of its resolutions. See *id.* at 600.

With respect to the reconciliation of the three competing sources of international law, recall that U.N.S.C.R. 1483 sloppily directed the Coalition to comply fully with international humanitarian law but nonetheless to promote legal and judicial reform. See S.C. Res. 1483, *supra* note 30, ¶¶ 5, 8(i).

One additional observation about the U.N. Security Council role in implementing the Project requires discussion. Some might fairly question the connection between criminal justice reform in an occupied territory and the threat to international peace and security required for U.N. Security Council action. While the U.N. Security Council may surely intervene to manage the belligerent occupation, the U.N. Security Council arguably acts beyond its powers when it sets detailed parameters for the reform of a failed criminal justice system in the occupied territory.²⁶⁰ Along this line of thinking, U.N.S.C.R. 1483's general directive to encourage "international efforts to promote legal and judicial reform"²⁶¹ should comprise the totality of U.N. Security Council activity at the confluence of such technical issues as the law of belligerent occupation and necessary approaches to criminal justice reform.

Distinguishing between the need for a well-functioning criminal justice system and the need for the reestablishment of peace and security ignores a groundswell of international and U.S. thinking that the two needs are inseparable. In the United States, promotion of the rule of law and, by extension, a well-functioning criminal justice system has become central to strategic success in armed conflict.²⁶² The U.N. Security Council itself has devoted a

²⁶⁰ While it does not address the particular issues at the heart of this paper, the concern about the U.N. Security Council generally acting *ultra vires* permeates literature considering the bounds of U.N. Security Council authority to act. See, e.g. Ratner, *supra* note 258, at 603 (highlighting a "favorite of many legal academics"—the "concern that the Council might act either beyond its powers in the Charter or in violation of other norms of international law").

²⁶¹ See S.C. Res. 1483, *supra* note 30, ¶ 8(i).

²⁶² See THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA at ii (2006). In his introduction to the U.S. National Security Strategy, the President of the United States ties the notions of freedom and justice, often synonymous with the rule of law, directly to international peace and security. See *id.*

substantial amount of time to debating the extent to which it should be involved broadly in the establishment of the rule of law and specifically in the promotion of well-functioning criminal justice systems in post-conflict societies.²⁶³

Rhetorical flourishes aside, members of the U.N. Security Council identified at least two ways in which the failed criminal justice system threatened international peace and security. First, chronic injustice suffered by populations as a result of failed criminal justice systems can grow into widespread violence.²⁶⁴ Second, failed criminal justice systems allow the transnational problems of terrorism and the organized crime that supports it to flourish, threatening international peace and security.²⁶⁵ To preserve international peace and security in the face of these two specific threats and in the more general interest of promoting human rights and the rule of law, a consensus among U.N. Security Council members has surfaced around the notion that coordination between the U.N. Security Council and other U.N. organizations is necessary.²⁶⁶

²⁶³ See U.N. SCOR, 58th Sess., 4833rd mtg., U.N. Doc. S/PV.4833 (Sept. 24, 2003); U.N. SCOR, 58th Sess., 4835th mtg., U.N. Doc. S/PV.4835 (Sept. 30, 2003); U.N. SCOR, 59th Sess., 5052nd mtg., U.N. Doc. S/PV.5052 (Oct. 6, 2004); U.N. SCOR, 59th Sess., 5052nd mtg., U.N. Doc. S/PV.5052 (Resumption 1) (Oct. 6, 2004). The agenda of each of these meetings was titled "Justice and the Rule of Law: the United Nations Role" and each dealt with the issue of the U.N. Security Council role within the U.N. system.

²⁶⁴ See U.N. SCOR, 58th Sess., 4833rd mtg. at 12, U.N. Doc. S/PV.4833 (Sept. 24, 2003) (quoting Mr. Passay, the Bulgarian representative to the U.N. Security Council).

²⁶⁵ See U.N. SCOR, 58th Sess., 4833rd mtg. at 14, U.N. Doc. S/PV.4833 (Sept. 24, 2003) (quoting Mr. Palacio, the Spanish representative to the U.N. Security Council).

²⁶⁶ See U.N. SCOR, 58th Sess., 4833rd mtg. at 9, U.N. Doc. S/PV.4833 (Sept. 24, 2003) (quoting Mr. Derbez, the Mexican representative to the U.N. Security Council). The U.N. Secretary General echoes the call for increased U.N. Security Council participation in reforming post-conflict criminal justice systems. In a section of a recent report making recommendations on U.N. Security Council mandates, the U.N. Secretary General asked the U.N. Security Council to play a very active role in transitional justice, including efforts to reform the criminal justice system of post-conflict societies. See The Secretary-General, *Report of the Secretary-General*

Given the U.N. Security Council's unique positioning to compel coordination among different U.N. organizations and its emerging role in post-conflict criminal justice reform, then, U.N. Security Council action like that called for by the Project makes sense. With the U.N. Security Council Resolution designated as the vehicle by which the Project's substantive provisions are triggered, the discussion proceeds to the substance of the Project's provisions.

b. The Substantive Provisions.

The Project's substantive provisions must reflect some fundamental characteristics of a belligerent occupation. Recall from the discussion above that by all accounts, an occupation is temporary.²⁶⁷ As such, the Project's substantive standards should account for the real possibility that the occupying force may not achieve full implementation of the criminal justice reforms attempted in the occupied territory before transferring authority to the true sovereign.²⁶⁸

on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, ¶ 64, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004).

²⁶⁷ Were an occupation anything other than temporary, it would amount to an annexation. See FM 27-10, *supra* note 50, ¶ 358.

²⁶⁸ The experience of Coalition Forces in Iraq provides some data in support of the proposition that there simply may not be time to accomplish complete reform of the failed criminal justice system of the occupied territory. Early in the occupation of Iraq, Coalition forces began training and institutionalizing a number of reforms within the Iraqi criminal justice system, to include court appointed attorneys, Miranda-style warnings, and prohibitions on police torture. This assertion is based on the author's recent professional experiences as the Trial Counsel, 3rd Brigade Combat Team, 101st Airborne Division (Air Assault), from July 2003 until February 2004. The United Nations declared the end of the Coalition occupation of Iraq when the Coalition Provisional Authority passed "full responsibility and authority" to the sovereign Interim Government of Iraq in June, 2004. See S.C. Res. 1546, pmbl., U.N. Doc. S/RES/1546 (June 8, 2004). Nearly two years later, the recently-departed Chief of the Human Rights Office for the U.N. Assistance Mission for Iraq reported on the widespread torture

Also recall that during the occupation, competing principles from competing sources of law will surface. The Project's substantive provisions must balance the two main competing principles: the preservation of the ousted sovereign from international humanitarian law and the protection of individual human rights from international human rights law.²⁶⁹ When addressing international humanitarian law and the principle of preserving the ousted sovereign, the Project's substantive provisions must speak in terms of the permissive or prohibitive nature of the provision. When addressing international human rights law and the principle of protecting individual human rights, the Project's substantive provisions must speak in terms of the rights or obligations reflected in the provision.

Dividing the occupying force's criminal justice system reform efforts into three phases accommodates the particular characteristics of belligerent occupation noted above. The occupying force, when assuming responsibility for the criminal justice system of the occupied territory, will tailor its activities to: 1) conducting an assessment of the criminal justice system, 2) performing immediate action to remedy the most egregious problems in the criminal justice system, and 3) legislating to systemically reform the criminal justice system. Phasing the occupying force's efforts to reform the criminal justice system acknowledges the time limits on the occupation and prioritizes effort to accomplish as much as possible during the occupation. Phasing also sets the conditions for long-term reform following the

and extra-judicial executions perpetrated by police commandos of Iraq's Ministry of the Interior, evincing the slow rate at which criminal justice system reforms can take place. *See Torture Widespread in Iraq, Expert Says*, AOL NEWS, Mar. 2, 2006, <http://articles.news.aol.com/news/article.adp?id=20060302065909990022>.

²⁶⁹ Recall from the discussion above the O.H.C.H.R. mandate to conduct its operations in accordance with this balance.

restoration of sovereignty.²⁷⁰ Finally, phasing ensures the proper principle of international law receives appropriate emphasis at specific points throughout the occupation.

In the Assessment Phase, the occupying force must measure the occupied territory's criminal justice system against the Project's substantive provisions adopted by the I.L.C. and the O.H.C.H.R., the U.N. General Assembly, and ultimately the U.N. Security Council. So what does that standard look like under the Project? In short, the Project should invoke provisions of the I.C.C.P.R. as the evaluative tools used during the Assessment Phase.

The criminal justice provisions that the Project should borrow from the I.C.C.P.R. are easily enumerated. Beginning with the I.C.C.P.R.'s establishment of an inherent right to life,²⁷¹ the occupying force must determine whether or not the occupied territory's criminal justice system retains the death penalty. In the event the death penalty has not been abolished, then the criminal justice system must contain the I.C.C.P.R.'s procedural

²⁷⁰ Importantly, the notion of a phased response compliments the U.N. Secretary General's initial thoughts on the U.N. role in fostering the rule of law in post-conflict societies. For example, the U.N. Secretary-General observes that implementing long-term systemic criminal justice reform might, in some cases, have to wait for "immediate term," less formal provisions to be established for the protection of the most vulnerable or victimized of the post-conflict populace. See The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 36, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004). In another section of the report, the U.N. Secretary-General expressly invokes the notion of phasing the restoration of the rule of law in a post-conflict society to reflect other pressing needs such as security or elections. See The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 21, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004). One final justification for phasing offered by the U.N. Secretary-General matches one justification for phasing implementation of the Project's substantive provisions. The U.N. Secretary-General presciently notes that the development of the rule of law in post-conflict societies will likely continue even after the U.N. Mission has departed the post-conflict nation. Phasing allows the Mission to take stock of its progress prior to the transition to post-Mission development efforts, much like the Project phasing allows the occupying force to take stock of its progress prior to the transition to a sovereign-led effort to continue reform. See *id.*

²⁷¹ See I.C.C.P.R., *supra* note 26, art. 6.

protections guiding its imposition.²⁷² Another of the Project's evaluative criteria for the punishment provisions of the occupied territory's criminal justice system requires the occupying force to determine whether or not individuals are subject to torture under the system.²⁷³

Next, the Project's evaluative criteria focus on the I.C.C.P.R.'s establishment of an inherent right to liberty and security of the person.²⁷⁴ The occupying force must determine the extent to which the occupied territory's criminal justice system prevents or permits arbitrary arrest or detention.²⁷⁵ Anyone arrested or detained on a criminal charge should

²⁷² See *id.* The I.C.C.P.R. states, in relevant part:

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court...

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. *Id.*

²⁷³ See *id.* art. 7. The I.C.C.P.R. states, in relevant part, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. *Id.* Obviously, this text extends the prohibition on torture, cruel, inhuman or degrading treatment beyond punishment alone to include all treatment within the criminal justice system.

²⁷⁴ See *id.* art. 9.

²⁷⁵ See *id.* The I.C.C.P.R. states, in relevant part:

1...No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. *Id.*

have the right to judicial or impartial review of the arrest or detention.²⁷⁶ In the case of an arrest or detention, the criminal justice system should ensure the humane and respectful treatment of the persons arrested or detained.²⁷⁷

From consideration of post-trial and pre-trial protections within the occupied territory's criminal justice system, the Project's evaluative criteria focus next on the procedural protections at trial itself. The criminal justice system should ensure equality at trial to include the presumption of innocence as the starting point for all criminal trials.²⁷⁸

²⁷⁶ See *id.* The I.C.C.P.R. states, in relevant part:

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subjected to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. *Id.*

²⁷⁷ See *id.* art. 10. The I.C.C.P.R. states, in relevant part:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status and unconvicted persons.

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. *Id.*

²⁷⁸ See *id.* art. 14. The I.C.C.P.R. states, in relevant part:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

2. Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law. *Id.*

The criminal defendant should have both the right to counsel and adequate time to prepare his defense.²⁷⁹ Likewise, the criminal defendant should have the right to examine or have examined the witnesses against him.²⁸⁰ Likewise, no individual should be compelled to testify against himself.²⁸¹

Finally, the Project's evaluative criteria should adopt the I.C.C.P.R.'s focus on the legal nature of convictions. So, for example, a convicted person should have the right to appeal the conviction to a higher court.²⁸² The criminal justice system should protect a

²⁷⁹ See *id.* The I.C.C.P.R. states, in relevant part:

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence [sic] and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.
Id.

²⁸⁰ See *id.* The I.C.C.P.R. states, in relevant part, "Everyone shall be entitled to the following minimum guarantees...to examine, or have examined, the witnesses against him and to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him." *Id.*

²⁸¹ See *id.* The I.C.C.P.R. states, in relevant part, "Everyone shall be entitled to the following minimum guarantees...not to be compelled to testify against himself or to confess guilt." *Id.*

²⁸² See *id.* The I.C.C.P.R. states, in relevant part, "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." *Id.*

convicted person from double jeopardy for the same offense.²⁸³ Lastly, the criminal justice system should not permit convictions based on ex post facto criminal laws.²⁸⁴

The Project's evaluative criteria need not derive exclusively from the I.C.C.P.R. Additional provisions could be added either during U.S. development of the Project proposal or during I.L.C. and O.H.C.H.R. review and codification. Observations from judicial assessment conducted in Iraq highlight two candidates for inclusion in the Project's evaluative criteria. Some additional provisions might, for example, address issues of corruption at different levels within the criminal justice system.²⁸⁵ Likewise, including criteria examining the independence of the judiciary makes sense.²⁸⁶

Whatever additional evaluative criteria find their way into the Project's substantive provisions, they should not detract from the central purpose of the Project: reconciling specific, competing provisions in the international law of belligerent occupation. Choosing the I.C.C.P.R. as the source for the evaluative criteria in the Project's substantive provisions makes sense on a practical level because I.C.C.P.R. criminal justice provisions are so

²⁸³ See *id.* The I.C.C.P.R. states, in relevant part, "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure." *Id.*

²⁸⁴ See *id.* The I.C.C.P.R. states, in relevant part, "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence...at the time when it was committed." *Id.*

²⁸⁵ The United States, the I.L.C., and the O.H.C.H.R. might draw anti-corruption provisions from existing U.N. sources. See e.g. Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, Annex, U.N. Doc. A/Res/34/169/Annex (Dec. 17, 1979) (promulgating in its Article 7 an anti-corruption rule).

²⁸⁶ The United States, the I.L.C., and the O.H.C.H.R. might likewise draw independence of the judiciary provisions from existing U.N. sources. See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, *Implementation of the Basic Principles on the Independence of the Judiciary*, ¶¶ 11-17.

globally accepted.²⁸⁷ One would anticipate few, if any, objections to their assimilation into the Project's provisions.

The true benefit of incorporating I.C.C.P.R. rules in the Project's substantive provisions is that in doing so, the United Nations squarely addresses the role of international human rights law in an occupied territory. As discussed above, the I.C.C.P.R. serves as the gold standard for international human rights law. Also discussed above, the extent to which the I.C.C.P.R. governs the actions of an occupying force is, at best, unsettled. Through the Project, the United Nations would expressly establish a role for the I.C.C.P.R. and international human rights law in an occupied territory through the Project's evaluative criteria outlined above.

Establishing a role for the I.C.C.P.R. in an occupied territory presents a potentially untenable position for the United States. How can the United States advocate using I.C.C.P.R. rules for an occupied territory on the one hand while arguing that the I.C.C.P.R. has no extraterritorial application on the other hand? The United States may hold both of these opinions at once because in an occupied territory, it holds two different positions at once.²⁸⁸

²⁸⁷ There are sixty-seven signatories and 155 parties to the I.C.C.P.R. as of 26 Jan. 2006. *See* International Covenant on Civil and Political Rights New York, 16 December 1966, <http://www.ohchr.org/english/countries/ratification/4.htm> (last visited Mar. 26, 2006).

²⁸⁸ The U.S. Supreme Court addressed the issue of applying the treaty obligations of the occupied territory. *See* *Terlinden v. Ames*, 184 U.S. 270, 283 (1902). The discussion of whether the occupying force should apply its own human rights obligations or the human rights obligations of the displaced sovereign is outside the scope of this paper.

When the United States advocates using I.C.C.P.R. rules as the Project's evaluative criteria in an occupied territory, the United States does so standing in the shoes of the displaced sovereign. For example, if the United States uses I.C.C.P.R. rules to assess Iraq's criminal justice system, the United States would, in fact, be acting in the place of the Iraqi sovereign to determine whether or not Iraq's criminal justice system complied with Iraq's human rights obligations under the I.C.C.P.R.²⁸⁹ Contrast this example with the distinguishable instance where the United States acts in an occupied territory, not as the administrator of Iraq, but as its own sovereign pursuing its own foreign policy through military operations. The United States can easily say the I.C.C.P.R. does not govern its conduct of extraterritorial military operations in Iraq, even if it previously said that Iraq itself has human rights obligations under the I.C.C.P.R. and the United States will ensure Iraqi compliance with those standards.

Returning, then, to the Project's main purpose of reconciling the conflicting sources of international law of belligerent occupation, adopting the I.C.C.P.R. provisions as the Project's evaluative criteria appears to simply place international human rights law in a position of preeminence over international humanitarian law during the Assessment Phase. In fact, international humanitarian law's general prohibition on legislating in an occupied territory survives the Assessment Phase unscathed. The Project limits the occupying force, during the Assessment Phase, to simply assessing the occupied territory's criminal justice system. In doing so, the occupying force is only determining whether the occupied territory

²⁸⁹ See generally MAJ Emily C. Schiffer, *Occupation and Post-Occupation Iraq: The Status of the ICCPR and the ICESCR; Is It Something More Than Alphabet Soup?* (20 Mar. 2006) (unpublished manuscript) (on file with author) (explaining the concept of the occupying force having two potential, separate human rights obligations for which it is responsible).

is in compliance with its own treaty law.²⁹⁰ The occupying force certainly takes no action with respect to changing the criminal justice system during the Assessment Phase.

Finally, the occupying force is, in fact, obligated to assess the criminal justice system of the occupied territory using the Project's evaluative criteria.²⁹¹ The obligatory nature of this assessment flows from the occupying force's responsibility as the administrator of the occupied territory. Before the occupation, the sovereign of the then-unoccupied territory had an obligation under international human rights law and, more specifically, under the I.C.C.P.R. to give effect to I.C.C.P.R. rights within its territory.²⁹² Standing in the shoes of the displaced sovereign, the occupying force must at the very least have an obligation to determine the extent to which the occupied territory's criminal justice system gives effect to I.C.C.P.R. rights in the occupied territory. Making the assessment obligatory certainly places emphasis on international human rights law in the occupied territory.

²⁹⁰ See Vienna Convention on the Law of Treaties art. 11, May 22, 1969, 1155 U.N.T.S. 331 (describing the means by which a State expresses consent to be bound by a treaty).

²⁹¹ This obligation should be tempered by reality within the occupied territory. The U.N. Security Council should impose a ninety day suspense on completing the assessment. At the end of ninety days, the occupying force should report back to the U.N. Security Council that it has completed the assessment. If operational or security concerns prevent the occupying force from completing the assessment, then the occupying force should report back to the U.N. Security Council on its failure to complete the assessment and on its operational justification for missing the suspense. The U.N. Security Council should then offer a reasonable extension to complete the assessment. Ultimately, repeated failures to complete the assessment could result in U.N. Security Council enforcement action.

²⁹² See I.C.C.P.R., *supra* note 26, art. 2(2). The I.C.C.P.R. states, in relevant part:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant. *Id.*

Despite the emphasis on international human rights law resulting from the Assessment Phases' obligatory nature, the obligation should not be too onerous for the occupying force. The U.S. experience in Iraq demonstrated that all kinds of criminal justice assessments result from the difficult business of administering an occupied territory.²⁹³ Examination of those assessments reveals, however, that no common evaluative criteria governed the assessors.²⁹⁴ To be sure, the obligatory Assessment Phase is not intended to create a requirement for an additional assessment.²⁹⁵ Instead, the Project's Assessment Phase merely provides the evaluative criteria to facilitate the assessment of the criminal justice system that experience shows will already occur.²⁹⁶

²⁹³ The U.S. military, the U.S. Department of Justice, and the United Nations all conducted judicial assessments in Iraq. See Civil Affairs JAG AAR, *supra* note 3; D.O.J Judicial Assessment Team Report, *supra* note 3.

²⁹⁴ See Civil Affairs JAG AAR, *supra* note 3; D.O.J Judicial Assessment Team Report, *supra* note 3.

²⁹⁵ See U.S. JOINT FORCES COMMAND, J7 PAM. Version 1.0, U.S. GOV'T DRAFT PLANNING FRAMEWORK FOR RECONSTRUCTION, STABILIZATION, & CONFLICT TRANSFORMATION 18 (1 Dec. 2005). This Joint Forces Command Pamphlet warns that "the last thing needed in an emergency is yet another lengthy assessment process." *Id.*

²⁹⁶ One final note on the relative ease with which the occupying force can meet its assessment obligation: both the United States and the United Nations recognize the value in collaborating on any such assessment. So, U.S. guidance to its military planners says, "The first objective of [strategic planners] should be to integrate existing international, [U.S. Government], nongovernmental organization (NGO), and other agency assessments into a common U.S. Government understanding of the situation." See *id.*

The United Nations, likewise, calls for the inclusion of local leaders, U.N. personnel, and other "stakeholders" (likely shorthand for military members, among others) in the assessment and planning phases of rule of law reform. See The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶¶ 15-17, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004).

One potential hurdle to obtaining U.N. cooperation during the Project's Assessment Phase is the reluctance of U.N. personnel to align themselves too closely with parties to an armed conflict, like an occupying force. U.N. personnel generally attempt to serve as the neutral actors on the ground. Telephone Interview with William H. Wiley, Human Rights Officer, U.N. Assistance Mission for Iraq, in Amman, Jordan (Mar. 7, 2006). U.N. neutrality may, however, be illusory. Consider the following:

The goals of humanitarian relief agencies in Iraq, particularly those of the U.N., were contradictory. On the one hand, they sought to portray themselves as neutrals in a war

Discussion of the next two phases flows more easily than the assessment phase because neither of the two remaining phases is obligatory for the occupying force. The second of three phases, the Immediate Action Phase, permits the occupying force to implement measures necessary to correct the most egregious failings of the occupied territory's criminal justice system. For example, if the procedural protections required by the Project's evaluative criteria concerning the death penalty were missing in the occupied territory's criminal justice system, the occupying power could suspend the imposition of the death penalty.²⁹⁷

The permissive nature of the Immediate Action Phase grows out of the recognition that conditions within the occupied territory may be such that an occupying force must prioritize other tasks ahead of those necessary to begin bringing the occupied territory's criminal justice system into compliance with the I.C.C.P.R.²⁹⁸ The competing tasks, such as humanitarian assistance, continuing offensive military operations, or related security efforts,

conducted by the United States and not sanctioned by the U.N... On this bases, they claimed the inviolability of neutral, impartial, and apolitical relief workers. On the other hand, the U.N. and humanitarian NGOs undertook activities that were frankly not apolitical at all—efforts to start rebuilding Iraqi state and social institutions, efforts which require serious political commitments to democracy, pluralism, and human rights, including the rights of women. These activities are not neutral in nature. See Kenneth Anderson, *Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003-2004 Afghanistan and Iraq Conflicts*, 17 HARV. HUM. RTS. J. 41, 42-43 (2004).

²⁹⁷ The Coalition Provisional Authority suspended the imposition of the death penalty in Iraq based on these concerns. See Coalition Provisional Authority Order 7 Section 3(1) 9 June 2003 Ambassador L. Paul Bremer

²⁹⁸ Recall the recognition on the part of at least one commentator contemporaneous to the drafting of the Hague Regulations that no two occupying forces will face the same conditions in two different occupied territories. See CONNER, *supra* note 37, at 53.

might be of equal, if not greater importance during the Immediate Action Phase.²⁹⁹ Making immediate action to address some failings of the criminal justice system obligatory might inadvertently cause more harm than good to the indigenous population of the occupied territory.

The Immediate Action Phase highlights another benefit provided by active U.N. involvement, through the Project, in the occupying force's efforts to reform the criminal justice system of the occupied territory. Again, immediate action permits some change in the occupied territory's criminal justice system with the aim of strengthening human rights within the occupied territory. This immediate action could defy international humanitarian law's command to respect the laws of the occupied territory.³⁰⁰ The O.H.C.H.R., however, through off-the-shelf training and reference material developed pursuant to the Project, could assist the occupying force with keeping its immediate action measures clear of the legislative-type changes prohibited by the Hague Regulations.³⁰¹

The O.H.C.H.R. could develop, based on experience in post-conflict societies, a set of frequently encountered failings in the criminal justice system. When the occupying force

²⁹⁹ The U.N. Secretary-General acknowledges the competing priorities in a post-conflict society that would interfere, albeit legitimately, with efforts to restore the rule of law. *See* The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 15, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004).

³⁰⁰ Recall Hague Regulations 43.

³⁰¹ The United Nations already recognizes the need to create a more robust complement of resources for rule of law topics which would include criminal justice. *See* The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 65, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004); U.N. Econ. & Soc. Council [ECOSOC], Commission on Crime Prevention and Criminal Justice, *Standards and Norms in Crime Prevention and Criminal Justice: Addendum 1*, ¶ 39, U.N. Doc. E/CN.15/2003/10/Add.1 (Mar. 10, 2003).

encountered one or more of the O.H.C.H.R.'s scenarios, the O.H.C.H.R. could recommend to the occupying force a measure that qualified as an Immediate Action Phase measure.

Suspending a certain punishment³⁰² or funding court-appointed defense attorneys³⁰³ would be the type of immediate action envisioned by this phase. On the contrary, developing new anti-corruption laws and requiring all judges to attend anti-corruption training might rise to the level of prohibited legislating.

The last of the three phases of the Project, the Legislation Phase, involves changing law within the occupied territory to facilitate systemic reform of the indigenous criminal justice system. In clear deference to the notion of preserving displaced sovereignty consistent with international humanitarian law, the Project generally prohibits the occupying force from legislating change in the occupied territory's criminal justice system. The general prohibition on legislating prevents the occupying force from re-tooling the institutions of the occupied territory's criminal justice system to make those institutions more comfortable to the occupying force's conception of criminal justice.³⁰⁴ Furthermore, prohibiting legislative

³⁰² See Coalition Provisional Authority Order 7.

³⁰³ This assertion is based on the author's personal experience as the Trial Counsel, 3rd Brigade Combat Team, 101st Airborne Division (Air Assault), from July 2003 until February 2004.

³⁰⁴ See The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 36, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004). One of the concerns with the occupying force remaking the occupied territory's criminal justice system to look more like the occupying power's native criminal justice system is that inevitably, informal mechanisms within the occupied territory's criminal justice system will be dismantled. See *id.* When that happens, the occupying force may be unaware of the change and therefore unable to explain the "exclusion of large sectors of society from accessible justice." See *id.* This concern is more than speculative. Recall the observation from the U.S. experience in Iraq where U.S. military personnel charged with reforming the criminal justice system began that process from a position of ignorance about civil law systems. See generally Civil Affairs JAG AAR, *supra* note 3 (describing the areas in which those involved in reconstituting the Iraqi criminal justice system lacked sufficient training to fully appreciate the system in which they were working).

reform efforts in the field of criminal justice system reform prevents the occupying force from further destabilizing the criminal justice system by initiating reform efforts that it might not complete prior to transferring authority back to the rightful sovereign.

The Project would create an exception to the general prohibition against legislating reform of the occupied territory's criminal justice system. With the consent of the O.H.C.H.R. and indigenous leaders, the occupying force may legislate reform flowing directly from the conclusions of its assessment. The safeguard of O.H.C.H.R. and indigenous leadership consent protects against the two concerns raised by unfettered occupying force authority. Specifically, gaining consent ensures the continued stewardship of reform efforts in the long-term process of institutionalizing human rights reforms in an occupied territory.³⁰⁵ The good will and proper motivation of the occupying force notwithstanding, the viability of a well-functioning criminal justice system is ensured by the commitment of the local population.³⁰⁶

A final word about monitoring compliance with and enforcing the Project's substantive provisions: these two functions will rely entirely on the United Nation's current model for authorizing and employing peace missions, without change. The U.N. Security Council will authorize some form of peace mission with an O.H.C.H.R. element in

³⁰⁵ See The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 64, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004).

³⁰⁶ Both the United States and the United Nations report this "lesson learned." See Petraeus, *supra* note 18, at 9; The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 64, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004).

support.³⁰⁷ That U.N. peace mission's human rights component will monitor the occupying force's actions relative to the Project's substantive provisions and report through O.H.C.H.R. and the Department of Peacekeeping Operations³⁰⁸ to the U.N. Security Council. In the case of a violation, the U.N. Security Council would have the full range of its traditional enforcement mechanisms at hand to compel the occupying force's compliance.

C. Pragmatic Challenges to the Post-Conflict Criminal Justice Reform Project

Critics of allowing the United Nations to prospectively engage in the type of binding treaty interpretation required by the Post-Conflict Criminal Justice Reform Project might argue that such a project is destined for failure because of its misguided reliance on the United Nations. To start, *Realpolitik*³⁰⁹ determines a state's relationship with the United Nations just as it guides the state's relationship with other nations.³¹⁰ A state, always posturing to expand its relative international power, would never accede to a U.N. project that could restrict the state's future ability to pursue its national policy.³¹¹ Critics might

³⁰⁷ See, e.g., S.C. Res. 1500, ¶ 2, U.N. Doc. S/RES/1500 (Aug. 14, 2003) (establishing the U.N. Assistance Mission for Iraq)..

³⁰⁸ See E-mail from William Wiley. This dual reporting channel already exists for the human rights office in U.N.A.M.I., for example. See *id.*

³⁰⁹ See generally HENRY KISSINGER, DIPLOMACY 137 (1994) (defining *Realpolitik* as "foreign policy based on calculations of power and the national interest").

³¹⁰ See *id.* at 249-250. Kissinger uses examples from the Cold War to demonstrate that "the communist veto" rendered the U.N. Security Council, and the broader notion of the United Nations as a collective security body, ineffectual except on the issue of the Korean War, a U.N. Security Council vote which the Soviet Union boycotted. *Id.* Furthermore, Kissinger speaks generally about smaller states exploiting the superpower tension within the halls of the United Nations to secure their own national interest. *Id.*

³¹¹ The concern about the United Nations' ability to create legally binding rules is as old as the U.N. Charter itself. The governments negotiating the U.N. Charter in San Francisco "overwhelmingly" rejected amendments to the U.N. Charter that would have empowered the United Nations to legislate binding legal rules of

invoke the “unilateral”³¹² nature of the U.S. execution of the Global War on Terror as the strongest example of a state attempting not to develop additional U.N. obligations, but to distance itself from them.

Careful consideration of the highest level U.S. diplomacy, however, reveals that the United States habitually executes its national policy through diplomacy at the United Nations or even under the auspices of U.N. authority. For example, the United States desperately sought a current U.N.S.C.R. authorizing Operation Iraqi Freedom prior to the Coalition’s invasion of Iraq in March 2003.³¹³ When the U.N. Security Council failed to deliver such

international law. *See* OFFICE OF PUBLIC INFORMATION, THE UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 4 (1967); HERBERT W. BRIGGS, THE INTERNATIONAL LAW COMMISSION 8-9 (1965). Briggs was a former U.S. representative to the ILC from 1962—1964. *See id.*

See generally Lessons Learned from the September 14-16 United Nations High Level Event: Hearing Before the H. Comm. on International Relations, 109th Cong. (2005) (statement of John R. Bolton, U.S. Permanent Rep. to the United Nations), available at http://wwwa.house.gov/international_relations/109/bol092805.pdf (citing U.S. and other nations’ objections, based on national policy concerns and state interest, to language in the Sept. 18, 2005 General Assembly Outcome Document following the High-Level Event marking the sixtieth anniversary of the U.N. Charter).

³¹² *See, e.g.*, Press Release, Congresswoman Zoe Lofgren, Resolution Authorizing the Use of Military Force Against Iraq (Oct. 9, 2002), <http://www.house.gov/Lofgren/news/2002/021009.htm> (criticizing the resolution authorizing the use of force against Iraq because the United States, by acting unilaterally, would thereby “insist there is one rule of international behavior for the United States and a different rule for all other nations.”); *NewsHour with Jim Lehrer* (PBS television broadcast Jan. 21, 2003) (transcript available at http://www.pbs.org/newshour/bb/middle_east/jan-june03/iraq1_21.html) (statement of Charles Kupchan, senior fellow at the Council on Foreign Relations, describing international perception that the United States is “no longer a team player”).

³¹³ *See, e.g.*, *NewsHour with Jim Lehrer* (PBS television broadcast Jan. 21, 2003) (transcript available at http://www.pbs.org/newshour/bb/middle_east/jan-june03/iraq1_21.html) (describing U.S. efforts to secure a U.N.S.C.R. authorizing U.S. use of force in Iraq). The Judge Advocate General’s Legal Center and School Operational Law Handbook contains a concise synopsis of this point and the ultimate legal justification posited by the United States for Operation Iraqi Freedom. INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 3 (2006).

authorization, the United States did not forsake further attempts to align its national interest with the United Nations, but argued alternative U.N. authority for the invasion of Iraq.³¹⁴

The United States cited U.N.S.C.R. 678's authorization to use force "to restore international peace and security" in the Middle East following Iraq's invasion of Kuwait.³¹⁵ U.N. authorization to use force against Iraq never expired, argued the United States, although the subsequent U.N.S.C.R. 687 concededly suspended the authorization by formalizing a conditional cease-fire between the Desert Storm coalition and Iraq.³¹⁶ When Iraq violated the terms of the U.N.-endorsed cease-fire more than a decade later,³¹⁷ it unwittingly resuscitated U.N.S.C.R. 678's dormant authorization to use force against Iraq.³¹⁸

Importantly, the United States did not make its case for U.N. authorization solely through press releases or oval office speeches. Instead, the President of the United States and

³¹⁴ See generally Press Release, The White House, Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq (Oct. 2, 2002), <http://www.whitehouse.gov/news/releases/2002/10/20021002-2.html> (laying out the U.S. position that because Iraq was in material breach of numerous U.N.S.C.R., the United States could still use military force against Iraq to enforce those U.N.S.C.R. pursuant to the 1991 authority of U.N.S.C.R. 678). While the U.N. Security Council declined to reissue the U.N.S.C.R. 678 authorization for U.S. use of force, it did adopt U.N.S.C.R. 1441 in November, 2002, concluding that Iraq remained in material breach of U.N.S.C.R. 687 compelling Iraq compliance with weapons inspections. See S.C. Res. 1441, ¶ 1, U.N. Doc. S/RES/1441 (Nov. 8, 2002). U.N.S.C.R. 1441 referenced U.N.S.C.R. 678's authorization to use force in Iraq, although it reached no conclusion on the continuing force of that authorization. See S.C. Res. 1441, pmbl., U.N. Doc. S/RES/1441 (Nov. 8, 2002).

³¹⁵ See Press Release, The White House, Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq (Oct. 2, 2002), <http://www.whitehouse.gov/news/releases/2002/10/20021002-2.html>.

³¹⁶ See INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 3 (2006) (proposing the idea that U.N.S.C.R. 687 suspended authorization to use force in Iraq by formalizing a cease-fire between the coalition and Iraq).

³¹⁷ See S.C. Res. 1441, ¶ 1, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

³¹⁸ See Press Release, The White House, Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq (Oct. 2, 2002), <http://www.whitehouse.gov/news/releases/2002/10/20021002-2.html>.

the U.S. Secretary of State took the case directly to the halls of the United Nations.³¹⁹ Even after the initial invasion of Iraq, the United States dutifully sought and received U.N. authority for continued U.S. presence in Iraq, for U.S. execution of the occupation, and for U.S. plans to transfer sovereignty to a democratically-elected Iraqi government.³²⁰

Of course, after the United States had secured U.N. authority to fully pursue its national policy in Iraq, anti-United Nations sentiment reached perhaps an all-time high during 2005 following the so-called “oil-for-food scandal.”³²¹ Even at the moment when the United States essentially needed nothing more from the United Nations vis-à-vis Iraq, arguably its issue of greatest national importance, and when U.N. legitimacy seemed lost for good, the United States still chose not to abandon the United Nations. At the height of anti-United Nations sentiment in the summer of 2005, the United States dispatched John Bolton

³¹⁹ See President George W. Bush, Remarks at the United Nations General Assembly (Sept. 12, 2002) (transcript available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>); Secretary of State Colin Powell, Address to the United Nations Security Council (Feb. 5, 2003) (transcript available at <http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html>).

³²⁰ See S.C. Res. 1546, Annex, U.N. Doc. S/RES/1546 (June 8, 2004). Then-Secretary of State Colin Powell wrote a letter to the President of the U.N. Security Council prior to the adoption of U.N.S.C.R. 1546 advising the U.N. Security Council that the U.S.-led coalition was prepared to maintain forces in Iraq to help secure the country and the way in which the U.S.-led coalition would use those troops in furtherance of the transfer of authority to a sovereign Iraqi government. See *id.* The U.N. Security Council annexed Secretary Powell’s letter to U.N.S.C.R. 1546 pursuant to his request. See *id.*

³²¹ See, e.g., CONG. REC. H4376 (June 13, 2005) (statement of Rep. Ros-Lehtinen) ??? The U.S. House of Representatives passed the United Nations Reform Act on 16 June 2005 in response to the anti-United Nations sentiment, although the bill was never enacted into law. See ...

to the United Nations not to begin disengaging the United States, but to lead the long-term process of U.N. reform.³²²

Shortly after Bolton assumed his duties as the head of the U.S. delegation to the United Nations, the U.N. General Assembly held a High Level Event to celebrate the sixtieth anniversary of the U.N. Charter.³²³ At the so-called “World Summit” marking the opening of the U.N. General Assembly’s sixtieth session, the President of the United States offered not only assistance, but leadership in reforming and ultimately strengthening the United Nations.³²⁴ Speaking to the importance of the United Nations, the President unqualifiedly declared, “The world needs the United Nations to live up to its ideals and fulfill its mission.”³²⁵ The U.S. Secretary of State also admonished the United Nations to “launch a lasting revolution of reform” even as she confirmed that, “The United States believes in a United Nations that is strong and effective.”³²⁶

³²² See President George W. Bush, Remarks on the Occasion of John Bolton’s Appointment as Ambassador to the United Nations (Aug. 1, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/08/20050801.html>).

³²³ See World Summit Outcome, G.A. Res. 60/1, ¶ 1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

³²⁴ See President George W. Bush, Address to the United Nations High-Level Plenary Meeting (Sept. 14, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/09/20050914.html>).

³²⁵ President George W. Bush, Address to the United Nations High-Level Plenary Meeting (Sept. 14, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/09/20050914.html>).

³²⁶ Sec’y Rice Remarks at U.N. General Assembly, *supra* note 1.

Following the lofty speeches at the United Nations, Bolton testified before the House International Relations Committee on 28 September 2005.³²⁷ During his testimony, Bolton provided further evidence that U.S. declarations about the importance of the United Nations constitute more than base rhetoric. He reasserted the value that the United States places in a strong United Nations and he reiterated the President's call for strengthening the United Nations through reform.³²⁸ Bolton then outlined several specific measures that members of the United Nations have negotiated and will negotiate toward the ultimate goal of making the United Nations more efficient, accountable, and credible.³²⁹

Again, responding to the arguments suggesting that the United States does, in fact, actively cloak its foreign policy in the procedures and authority of the United Nations, the cynic might say that the United States does so merely as a political play. In this vein, the cynic would posit that regular diplomacy with the United Nations as a matter of international relations differs greatly from regular accountability to the United Nations as a matter of international law. The cynic would then argue that the examples listed above represent international politics and nothing more. On the issue of the U.S. invasion of Iraq, for example, the United States sought U.N. authority for various stages of the operation not out

³²⁷ See *Lessons Learned from the September 14-16 United Nations High Level Event: Hearing Before the H. Comm. on International Relations*, 109th Cong. (2005) (statement of John R. Bolton, U.S. Permanent Rep. to the United Nations).

³²⁸ See *Lessons Learned from the September 14-16 United Nations High Level Event: Hearing Before the H. Comm. on International Relations*, 109th Cong. (2005) (statement of John R. Bolton, U.S. Permanent Rep. to the United Nations).

³²⁹ See generally *Lessons Learned from the September 14-16 United Nations High Level Event: Hearing Before the H. Comm. on International Relations*, 109th Cong. (2005) (statement of John R. Bolton, U.S. Permanent Rep. to the United Nations) (describing the "improvement of management of organizations, better use of U.N. resources, reforms to make the institution more effective in protecting human rights, and reforms to make the U.N. more effective in moving countries from conflict to peace.").

of a sense of obligation, but as a way to confer political legitimacy on U.S. military operations in Iraq.

Three related responses counter the cynic's argument in this case. First, by its efforts to secure multiple U.N.S.C.R.'s relative to its invasion of Iraq, the United States did effectively bind itself to the legal obligations memorialized in those U.N.S.C.R.'s.³³⁰ Second, whatever the U.S. motivation for repeatedly returning to the United Nations on the issue of Iraq or subsequently on the issue of U.N. reform, the fact remains that the United States repeatedly returned to the United Nations. Even if the United States pursued only political goals of legitimacy or credibility when it embraced the United Nations, the United States nonetheless incurred U.N. Security Council-imposed legal obligations when it did so. That the United States might incur U.N. Security Council-imposed legal obligations solely for the purpose of adding international credibility or legitimacy to its foreign policy does not in any way lessen the effect of those obligations.

The third response to the cynic follows closely from the previous two. The cynic would surely dismiss the idea that the United States would agree to incur U.N.-imposed legal obligations for moral reasons as nostalgic, naïve, or otherwise. Even so, the cynic must concede that incurring those obligations for the realist purposes of credibility, legitimacy, or

³³⁰ Once the Security Council has acted on a given issue, it is free to enforce its resolutions. *See* U.N. Charter art. 41 (stating, "The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions."). Of course, the United States is a veto-wielding member of the U.N. Security Council. In fairness to the cynic, it is difficult to imagine a scenario wherein the United States would vote to impose sanctions on itself for its own violation of a U.N.S.C.R. It is equally difficult, however, to envision a scenario where the United States would propose and then vote to impose a legal obligation on itself with which it had no intention of complying.

public perception is often necessary. Especially in the context of the scope of this paper—criminal justice reform in an occupied territory—the very limited U.N. codification of legal requirements governing U.S. efforts to effect criminal justice reform in Iraq has tremendous practical merit.

Two observations support the conclusion that incurring U.N.-imposed legal obligations in the field of criminal justice reform in an occupied territory makes pragmatic sense. First, as discussed previously, the United States already does essentially what the Post-Conflict Criminal Justice Reform Project would compel it to do. To reinforce this point in general terms, consider what General Peter Pace, the U.S. Chairman of the Joint Chiefs of Staff, wrote in his guidance to the joint staff. In that document, General Pace stressed the strategic and operational necessity of aiding other nations “to create good governance and the rule of law” in the context of winning the war on terror.³³¹ Criminal justice reform surely fits within the broader notion of creating the rule of law.

Likewise, General Pace encouraged the joint staff to develop a “proactive outreach program” to international partners, among other individuals and entities.³³² Such an outreach program expands U.S. capacity to solve difficult problems,³³³ like reforming the failed criminal justice system in a territory that the United States occupies. Military guidance, then,

³³¹ See Memorandum, The Chairman of the Joint Chiefs of Staff, to the Joint Staff, subject: The 16th Chairman’s Guidance to the Joint Staff: Shaping the Future, para. III(A) (1 Oct. 2005).

³³² See Memorandum, The Chairman of the Joint Chiefs of Staff, to the Joint Staff, subject: The 16th Chairman’s Guidance to the Joint Staff: Shaping the Future, para. IV(D) (1 Oct. 2005).

³³³ See Memorandum, The Chairman of the Joint Chiefs of Staff, to the Joint Staff, subject: The 16th Chairman’s Guidance to the Joint Staff: Shaping the Future, para. IV(D) (1 Oct. 2005).

from the very highest levels of the military establishment, commits the United States to tasks like criminal justice reform and to international partners like the United Nations.

A second observation builds on the first: U.S. diplomacy exploits its international partnerships to develop the legitimacy of its foreign policy. Again, consideration of the President's actions makes the point. In December 2005, the President issued National Security Presidential Directive 44 (N.S.P.D.-44), focusing on U.S. capacity to stabilize and reconstruct "foreign states and regions at risk of, in, or in transition from conflict."³³⁴ The stability effort includes human rights notions of governance, social rights, and justice.³³⁵ In N.S.P.D.-44, the President directs the Secretary of State to, among other things, coordinate U.S. stability and reconstruction efforts with international organizations.³³⁶

While N.S.P.D.-44 provides guidance in only the most general terms, its progeny expressly discuss coordination with the United Nations, accountability to international legal regimes, and developing legitimacy and credibility as necessary means of national policy. For example, pursuant to N.S.P.D.-44, the U.S. State Department and the U.S. Defense Department co-authored a planning process for interagency stabilization and reconstruction efforts in post-conflict nations.³³⁷ The planning process calls repeatedly for integration of

³³⁴ The White House, National Security Presidential Directive/NSPD-44, Intro. (Dec. 7, 2005).

³³⁵ The White House, National Security Presidential Directive/NSPD-44, at 2 (Dec. 7, 2005).

³³⁶ The White House, National Security Presidential Directive/NSPD-44, at 3 (Dec. 7, 2005).

³³⁷ See U.S. JOINT FORCES COMMAND, J7 PAM. Version 1.0, U.S. GOV'T DRAFT PLANNING FRAMEWORK FOR RECONSTRUCTION, STABILIZATION, & CONFLICT TRANSFORMATION (1 Dec. 2005).

U.S. efforts with international responses, expressly referencing the United Nations.³³⁸ In addition to the planning process's call for voluntary U.S./international integration, planners must also assess the international legal obligations impacting stabilization and reconstruction efforts.³³⁹

Importantly, the planning process requires building international partnerships for the express purpose of fostering the legitimacy of U.S. efforts to stabilize and rebuild post-conflict societies.³⁴⁰ Additionally, whatever the goals of U.S. national policy, the planning process directs targeted public communications efforts "to sway public opinion" in support of U.S. efforts in post-conflict societies.³⁴¹ The combination of the two directives demonstrates that the United States wants to partner with international organizations and then highlight the relationship for the world to see.

Arriving full circle, then, U.S. policy makers would likely view compliance with the provisions of the Post-Conflict Criminal Justice Reform Project as an opportunity rather than an obligation. Compliance comes at a cheap price. The United States, as a strategic matter,

³³⁸ See generally U.S. JOINT FORCES COMMAND, J7 PAM. Version 1.0, U.S. GOV'T DRAFT PLANNING FRAMEWORK FOR RECONSTRUCTION, STABILIZATION, & CONFLICT TRANSFORMATION (1 Dec. 2005) (repeatedly reinforcing the notion of integrating U.S. efforts with international efforts, including references to the United Nations in the context of funding U.S. foreign policy, of coordinating U.S. foreign policy, and informing U.S. foreign policy).

³³⁹ See U.S. JOINT FORCES COMMAND, J7 PAM. Version 1.0, U.S. GOV'T DRAFT PLANNING FRAMEWORK FOR RECONSTRUCTION, STABILIZATION, & CONFLICT TRANSFORMATION 20 (1 Dec. 2005).

³⁴⁰ See U.S. JOINT FORCES COMMAND, J7 PAM. Version 1.0, U.S. GOV'T DRAFT PLANNING FRAMEWORK FOR RECONSTRUCTION, STABILIZATION, & CONFLICT TRANSFORMATION 32-33 (1 Dec. 2005).

³⁴¹ See U.S. JOINT FORCES COMMAND, J7 PAM. Version 1.0, U.S. GOV'T DRAFT PLANNING FRAMEWORK FOR RECONSTRUCTION, STABILIZATION, & CONFLICT TRANSFORMATION 33 (1 Dec. 2005).

already emphasizes building the rule of law in an occupied territory through projects like reforming the occupied territory's failed criminal justice system. Simply by performing the tasks it would perform anyway, the U.S. military could meet the Post-Conflict Criminal Justice Reform Project's relatively agreeable provisions.

Having complied with the U.N.-imposed obligations, the United States would enjoy an enhanced ability to exploit that compliance. The United States would be able to demonstrate first that it partnered both with the United Nations and the indigenous leadership to infuse the occupied territory's criminal justice system with important human rights provisions. Then, the United States would be able to show that it willingly assumed the legal obligation to implement the reforms, rather than simply striking up a partnership for political expediency. For U.S. policymakers, the entire project carries the weight of U.N. authority and the resultant legitimacy.³⁴²

V. Conclusion.

³⁴² See Henry Cabot Lodge, *The United Nations: Its Founding, Its Performance, and Its Future*, in *THE UNITED NATIONS IN PERSPECTIVE* 1, 10 (E. Berkeley Tompkins, ed. 1972) (Hoover Institution Publications). According to Lodge:

Although we should have enough 'management influence' in the administration of multilateral programs to assure that nothing is done under the programs that is not in line with U.S. objectives, our participation in multilateral programs would get us credit, especially among Afro-Asians and Latin Americans, for acting unselfishly and altruistically under U.N. auspices. Such credit would be unlikely to redound to us from a bilateral program, where our motives—however unjustly—are always somewhat suspect. *Id.*

In conclusion, then, reform at the United Nations offers the most practicable method of settling the question of criminal justice reform within the law of belligerent occupation. By making the U.N. Security Council Resolution the trigger for the applicable standards governing an occupying force's authority to reform the penal system it encounters in an occupied territory, advocates of state sovereignty have the assurance that these standards will be invoked only in accordance with current practices in U.N. Security Council action. By incorporating provisions from the I.C.C.P.R. in these criminal justice reform standards, advocates of individual sovereignty have the assurance that these standards will enjoy broad acceptance and not simply reflect the political views of the veto-wielding members of the U.N. Security Council.

Better yet, empowering the United Nations to serve as standard bearer in this very limited field of law capitalizes on the very best attributes of what the United Nations theoretically embodies. First, the United Nations provides an unparalleled forum in which to maximize state participation in resolving an issue of international legal import. Second, the United Nations provides a continuous forum, allowing the law of belligerent occupation to be revisited as experience and circumstance demand closer consideration of its provisions, whether deriving from international humanitarian law, international human rights law, or precedent U.N. Security Council Resolutions. Finally, the U.N. provides a viable means of enforcement for this important, albeit limited, area of international law.